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IN THE

Supreme Court of the United States

No. 647.

DAVID S. BARRY, Sergeant-at-Arms of UNITED STATES SENATE, and JOHN J. McGRAIN, Deputy Sergeant-at-Arms,

Petitioners,

against

UNITED STATES OFAMERICA, ex rel, THOMAS W. CUNNINGHAM,

Respondent.

BRIEF FOR RESPONDENT.

COUNTER-STATEMENT OF FACTS.

The omission of essential facts from petitioners' statement makes necessary this counter-statement in chronological order of them.

On April 5, 1926, at the first session of the 69th Congress, Senate resolution 195 was introduced. This resolution as set forth in the title,

> "Authorized the 'President of the Senate to appoint a special select committee * * * to investigate what money, emoluments, rewards, or things of value,

including agreement or understandings of support for appointment or election to office have been promised, contributed, made or expended, or shall hereafter be promised, contributed, expended, or made by any person, firm, corporation, or committee, organization or association, to influence the nomination of any person as a candidate to any political party or organization for membership in the United States Senate at the general election to be held in November 1926. Said committee shall report the names of the persons, firm, or corporations, or committees, organizations, or associations that have made or shall hereafter make such promises, subscriptions, advancements, or payments and the amount of them severally contributed or promised as aforesaid; including the method of expenditure of said sums or the method of expenditure of said sums or the method of performance of said agreements, together with all facts in relation thereto." (Original 44, Rec. 34)

The resolution further provided:

"Every person who, having been summoned as a witness * * * who, having appeared, refuses to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by section 102 of the Revised Statutes of the United States." (Original 44, Rec. 34)

On May 18, 1926, the Pennsylvania primaries were held; and on May 19, 1926, Senate Resolution 195 was passed and the special committee appointed.

Sometime between the 3rd day of July, 1926, and the 29th day of July, 1926, respondent was served, in the City of Philadelphia, with a subpoena from the Senate, commanding him,

"to appear before the Special Committee • • • at the office of the United States District Attorney located in the City of Chicago, Illinois • • • to testify • • • touching the collection and payment of moneys or promises of emoluments • • • to influence the nomination of any person • • • at the general election to be held in November 1926, for the office of United States Senator from the State of Pennsylvania."

On July 3, 1926, the first session of the 69th Congress adjourned.

On July 29, 1926, the respondent appeared before the Special Committee, sitting at Chicago. His testimony as to the several matters included within the scope of the Committee's inquiry is set forth at large on pages 17 to 28 inclusive, (Rec. 14-28); and is summarized as follows in the opinion of the President Judge Buffington (print, 68).

"As bearing on 'what money • • • have been contributed,' testified he had contributed fifty thousand dollars. As bearing on the question whether such money contributed 'to influence the nomination of any person as a candidate for membership in the United States Senate,' he testified that he paid the money to Thomas F. Watson, Treasurer of a political organization which was supporting Vare for nomination for United States Senator and Beidleman for Governor; that while he favored and supported Vare as a candidate, his whole object in giving the money was to assist Beidleman, and if Beidleman 'had not been on the ticket I would not have given it.' Touching the subject of investigation described as 'including the method of expenditure of said sums,' Cunningham testified he did not know whether his contribution

had been reported in Beidleman's campaign expenses, adding, 'I instructed Mr. Watson what my thought was about it'."

The witness on advice of counsel refused to answer any question touching upon the source of his wealth or the manner of its accumulation, or out of what part of his estate the money personally contributed by him came. On November 2, 1926, the general election was held at which William S. Vare received 822,187 votes and William B. Wilson, 648,680 votes.

On December 6, 1926, the second session of the 69th Congress convened; and on the 22nd day of December, 1926, the Special Committee submitted its report containing respondent's testimony, which stated that notwithstanding,

> "every opportunity was given the witness Cunningham to testify * * * he steadfastly and obdurately refused to give your committee any—information. * * * Your Committee reports the facts as aforesaid to the Senate for such further action as the Senate may deem * * * proper." (Original p. 42, Rec. 33.)

On January 8, 1927, Hon. William B. Wilson filed his petition contesting the election of Hon. William S. Vare.

On January 10, 1927, the Vice President laid before the Senate Governor Pinchot's certificate, which stated:

> "that * * * William S. Vare appears to have been chosen by the qualified electors of the State of Pennsylvania."

On January 10, 1927, Senate Resolution 325 was offered and on January 11th, passed.

> "authorizing the select committee * * * to take and

preserve evidence in connection with the election of a senator from Pennsylvania on November 2, 1926."

On February 21, 1927, the respondent was again subpoenaed and appeared before the Special Committee at Washington, submitted himself to examination; and in effect, stood on his previous refusal to answer certain questions which were by him deemed of a personal nature (Rec. 28-32).

On the same day, Senator Reed, the Chairman of the Special Committee read into the record of the Senate a resolution 364, as follows:

"RESOLVED, That Senate Resolutions Nos. 195, 227, and 258 of the Sixty-ninth Congress, first session, and Senate Resolution No. 324 of the Sixty-ninth Congress, second session, be and they hereby are continued in force during the Seventh Congress."

On February 24, 1927, this resolution was submitted to the Senate, but died with the close of Congress on March 4, 1927.

On February 28, 1927, the Special Committee filed its report 1197, part 5, wherein it

"reports the defiant and contumacious conduct of the said witness, Thomas W. Cunningham, and recommends that he be adjudged in contempt of your committee and of the Senate of the United States." (Original 43, print 33.)

On March 3, 1927, the credentials of Hon. William S. Vare, as United States Senator, signed by Governor Fisher, were presented.

On March 4, 1927, the 69th Congress expired by constitutional limitation, without the Senate's taking any ac-

tion to continue in force the special standing committee, or to adjudge in contempt respondent.

On December 5, 1927, the first session of the 70th Congress convened; and Senator Norris of Nebraska introduced Senate Resolution 2.

On December 9, 1927, Senate Resolution 2 was adopted and William S. Vare "was denied a seat in the United Senate;" but was accorded

> "the privileges of the floor of the Senate for the purpose of being heard touching his right to receive the oath of office and to membership in the Senate." (Original 52, Rec. 41.)

On December 12, 1927, the Senate passed Resolution 10, which provides, that the

> "said Senate Resolution 195 of the Sixty-ninth Congress, first session, shall continue to execute the directions of the * * * resolutions relating to the said committee until the Senate accepts or rejects the final report of the said special committee or otherwise orders." (Original 52, Rec. 41.)

On March 22nd, 1928, the Special Committee made its *final report to the 70th Congress,*

> *"insofar as—Cunningham is concerned—and renews the recommendation made in its report of February 28, 1927, that—Cunningham be adjudged in contempt of your committee and of the Senate of the United States."* (Original 43, Rec. 34.)

The Senate on the *same day* adopted Resolution 179. The recital of this resolution *charged respondent with the contumacy* for which the Committee had recommended he be adjudged in contempt, in the following language—that he had been:

> *"twice called before the Committee * * * of the 69th Congress (and) declined to answer certain questions."* (print 11.)

The resolution authorized and directed:

> "The President of the Senate issue his warrant * * * *to take into custody* * * * *and to bring* * * * *Cunningham before the bar of the Senate* * * * *or elsewhere, as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate* * * * *may propound and to keep* * * * *Cunningham in custody to await further order of the Senate."* (Original 16, Rec. 11.)

The warrant thereupon issued for the offense charged in the recital and pursuant to the resolution, commands the Sergeant-at-Arms "to forthwith arrest and take into custody and bring to the bar of the Senate Thomas W. Cunningham." (Original 15, Rec. 10).

On March 26, 1928, the Senate passed a motion wherein it referred to the United States District Attorney for the District of Columbia, under the Act of January 24,

1857, 11 Stat. 155, relating to punishment of contempt as a crime, its final report made on March 22, 1928, relating *to the "contumacy of Thomas W. Cunningham • • • for appropriate action by that officer."* (Rec. 45-46.)

Respondent was then arrested on that warrant charged with contumacious conduct because he declined to answer certain questions propounded at two hearings held by the Special Committee during the 69th Congress.

Respondent was kept in custody until released on a writ of habeas corpus.

On April 5, 1928, the return of the respondents to the writ was filed and the matter argued before U. S. District Judge Dickinson; traverse to return being filed *nunc pro tunc* on April 12, 1928 (Original 55, Rec. 43).

The PETITION for the writ averred that petitioner (respondent) had been arrested on warrant of the Senate and was then "kept • • • in its custody" until its "further order;" that the warrant of arrest was issued as the first step in proceedings instituted by the Senate to punish respondent for alleged contumacy as a witness; and that the Senate was without authority and power in the premises.

It averred that obedient to request, respondent voluntarily appeared before the Committee, gave testimony, but refused to disclose "the amount, character and source of his private estate;" and that the proceedings in which respondent was adjudged contumacious, were in the nature of an "inquisitorial excursion into the private affairs of a citizen," the effect of which would be that "the Constitution of the United States will be violated and the individual liberty of your petitioner illegally destroyed." (Original 6, Rec. 4.)

The ANSWER • • • denied "the Senate • • • had adjudged petitioner • • • to be in contempt;" and averred that the warrant of arrest was in the nature of a subpoena to compel his attendance as a witness. (Original 12, Rec. 8.)

The TRAVERSE re-averred the Senate's charge of respondent's contumacy in the 69th Congress as set forth in the recital of the resolution of the 70th Congress, and in greater detail, re-affirmed respondent's detention in custody was pursuant to proceedings in contempt which the Senate had initiated against him, and in analogy to all precedents of both Houses of Congress to punish him for contempt, if he did not purge himself of the contumacy charged. (Original 55, Rec. 43.)

It averred that the 70th Congress had referred to the United States District Attorney for the District of Columbia, "*the contumacy of Thomas W. Cunningham, a witness;*" that the 69th Congress had expired without taking any action on the recommendation of the Committee "*that relator be adjudged in contempt;*" and that the power to punish ceased with the dissolution of that Congress. (Original 55, Rec. 43.)

It further averred that appellant had "obeyed every subpoena of the Senate * * * during the 69th Congress;" that relator "had never been requested or summoned by subpoena of the Senate in the 70th Congress to appear as a witness;" and had "never refused to obey any request and subpoena of the 70th Congress". (Original 55, Rec. 43.)

It also averred that the warrant was void, being in excess of the Senate's power and suggested that the warrant was not a subpoena, and if so, was void because in excess of the Senate's power and abuse of judicial process (Original 59, Rec. 46).

On the 20th day of April, 1928, His Honor Judge Dickinson filed his opinion remanding relator, discharging the writ, and denying motion to admit relator to bail pending appeal (Original 70, Rec. 55).

On the same day the Circuit Court of Appeals for the Third Circuit, through Honorable J. Warren Davis, made

its order granting supersedeas upon entry of bail (Original 72, Rec. 57).

The learned District Judge in opinion filed, ignored the fact of respondent's arrest under a warrant issued pursuant to the Senate's Resolution which charged the commission of a past offense, and directed his being kept in custody; concluded such warrant was a subpoena "to enforce * * * attendance;" and refused to consider either the jurisdiction of the court to pass upon the power of the Senate to issue the warrant, or the pertinency of the question which constituted the subject-matter of the alleged offense of contumacy. (Original 60, Rec. 47.)

The Circuit Court of Appeals on November 26th, 1928, in an opinion by Circuit Judge Buffington, concurred in by Davis, C. J., with dissenting opinion of Woolley, C. J., reversed the District Court of the United States for the Eastern District of Pennsylvania, and remanded the record, "with instructions to discharge the petitioner."

The opinion of the Circuit Court of Appeals holds that the court below erred in refusing to consider either its jurisdiction to pass upon the Senate's power to issue the warrant, or the alleged contumacy; that the courts have jurisdiction to discharge a witness arrested on a warrant issued by the Senate of the United States without or in excess of its power; that the

> "refusal to answer certain specific questions was the sole ground of the Senate's action and therefore the sole ground of Cunningham's arrest. To contend the warrant of arrest was a subpoena to appear and testify, and not an arrest for contempt after he had duly appeared is to ignore the real situation. If the warrant of arrest is not based on the witness's alleged contempt in refusing to answer the questions propounded by the committee, it has no ground justifying its issue, for he did duly appear. And if it is

regarded as an arrest to procure Cunningham's attendance as a witness, a subpoena served on him and neglect on his part to appear constitute the prerequisite preliminaries before an attachment for non-attendance issues." (Rec. 67.)

The opinion closes with an analysis of the testimony of respondent, and concludes that the respondent answered every relevant question pertinent to the inquiry, and that the questions which he refused to answer were not within the scope of the inquiry. (Rec. 70.)

The dissenting opinion of Woolley, C. J., is based on two reasons: (a) the warrant of arrest is in the nature of a subpoena, or as stated in the opinion, a "process to enforce the Senate's power of inquiry"; and (b) on the broad legal proposition "that the action (as distinguished from legislation) of the Senate of the Congress of the United States, a constituent body of an independent department of the government, is not subject to review and annulment by the judicial department." (Rec. 70-72.)

On February 25, 1929, this Court granted a writ of certiorari on application of the petitioners.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

COURT'S JURISDICTION—SENATE'S POWER.

The inquiry in the large is not as suggested by petitioners, the power of the Senate to "issue a warrant of arrest to compel the presence of a witness at its Bar;" but rather relates to the jurisdiction of the courts to release on habeas corpus writ, an alleged contumacious witness held in custody on a warrant of arrest issued by the Senate of the United States, without or in excess of its power.

The specific questions follow:

(1)

U. S. CONSTITUTION—CUSTODY IGNORED—NATURE OF PROCESS.

On writ of habeas corpus of an alleged contumacious witness, may a court (a) *ignore* his arrest under a warrant issued pursuant to the resolution of the Senate of the United States, which charged a past contumacy and directs his being "kept in custody to await further order;" (b) *conclude* that such warrant is in the nature of a subpoena "to enforce * * * attendance," notwithstanding his obedience to every (two) previous subpoena and no outstanding process or refusal to testify at the time of the arrest; and (c) *refuse* to consider either the jurisdiction of the Court to pass upon the power of the Senate to issue the warrant or the subject-matter of the alleged contumacy.

(2)

CONTUMACY—PERTINENCY.

In proceedings to punish for contumacy, may the Senate of the United States "take * * * and keep * * * in

custody" a witness who having testified to fact, amount, form, time and place of his personal contribution, has refused to answer questions as to the source or manner of accumulation of his individual wealth, where the scope of inquiry relates to the contributions made to the fund raised in furtherance of a candidate seeking nomination as a United States Senator.

ARGUMENT.

This argument should be prefaced with a short reference to petitioners' erroneous statement (1) of the broad inquiry involved in these proceedings, (2) of respondent's theory of relief, and (3) of an essential fact.

Petitioners' argument assumes, and the first sentence of the statement of "Questions Presented" in the petition for writ of certiorari, says:

> "The Circuit Court of Appeals based its decision on a construction of the resolution and warrant under which respondent was arrested, *which is partially justified by holding that an attachment process could not have been used to compel attendance of a witness.*"

District Judge Dickinson in the opinion of the court of first instance says:

> "The only question presented is whether the Senate in the course of an inquiry in aid of legislation or when sitting as a Court to determine the election returns and qualifications of those claiming the right to sit as members of that body *has lawful power to enforce the attendance of any one not a member to give testimony.*" (Original 65, Print 51.)

It is respectfully suggested that the Circuit Court of

Appeals did not in any way attempt to justify its decision by holding "that an attachment process could not have been used to compel attendance of a witness;" and that the question presented is not as to the power of the Senate "to enforce the attendance of any one not a member to give testimony"; as stated by the learned District Judge or, "to compel the presence of a witness at its Bar", as stated in Brief of Petitioners, page 2. Both of these statements omit the vital fact which gave rise to and is the heart of the pending proceeding; i. e., the pertinency of the questions which respondent refused to answer.

Respondent has always admitted the Senate's power to compel his attendance as a witness by subpoena or other legal process. The broad inquiry as to the existence of that power, will not then be discussed in this argument because not raised.

It should be sufficient to state that respondent has obeyed every subpoena which the Senate issued in the 69th Congress, and never disobeyed any subpoena or process in either the 69th or 70th Congress, and that as stated in the opinion of the District Judge:

> "The truth is averred to be that the relator is and at all times has been ready and willing to testify as to all matters save only those in his refusal to answer which he has the support of the law." (Original 64, Rec. 50.)

The accurate statement of the broad inquiry involved relates to the right of a court to ignore the fact of an arrest under a warrant, treat such warrant as a subpoena and refuse to consider the power of the tribunal, under whose authority he is kept in custody to initiate proceedings in contempt against a witness who refused to answer questions of disputed pertinency.

(2)

The opinion of the District Court states that respondent's theory of relief:

> "proceeds upon the fact theory that the relator had been adjudged by the Senate to have been guilty of the offense of a contempt of its lawful power and of its dignity and to have been taken into custody as a punishment or to have a sentence of punishment imposed. In other words, the process here is execution process in the general nature of a writ of capias ad satisfaciendum." (Original 63, Rec. 50)

The dissenting opinion of Woolley, C. J., falls into a similar error, when he concludes that the majority opinion of the Circuit of Appeals,

> "has stated the case as though the Senate of the United States had in fact adjudged Cunningham, the relator guilty of contempt for refusing to answer questions, which its committee had theretofore propounded to him, and, standing on that predicate, it has entered into a discussion of the relevancy and validity of the questions asked and the relator's justification for refusing to answer them." (Original 75, Print 70)

The basis of petitioners' argument is that the Circuit Court of Appeals sustained respondent's assumed theory that the Senate had finally adjudicated him guilty of contempt and that its warrant was the execution of its punishment.

Respondent answers that it has never been his position, nor does the opinion of the Circuit Court of Appeals conclude that Resolution 179 of the 70th Congress, and warrant of arrest issued pursuant thereto, are either in the nature of final adjudication of his alleged contempt, or as the execution of the Senate's punishment.

He has always assumed, and the Circuit Court of Appeals has concluded, in effect that the Special Committee recommended that he be adjudged in contempt because of contumacy committed by him on two occasions in the 69th Congress; that the Senate acted on this recommendation when on the same day that the report was filed, it passed resolution 179 in the 70th Congress, the recital of which charged him with this specific offense; that because of such contumacy, Resolution 179 was the first step taken by the Senate in the contempt proceedings to have him legally punished therefor, *if finally so adjudged*, when he appeared before the Senate "to answer such questions * * * as the Senate * * * may propound."

Uniformily it has been urged that the inclusion in Senate Resolution 179 of the order to appear before the Bar of the Senate and there to answer "questions pertinent to the matter under inquiry," *was to give to the accused an opportunity to purge himself of the contempt charged.*

Since a contumacious witness should not be punished without proper proceedings being instituted against him after the commission of the offense, Resolution 179 was in effect and in analogy to the practice which obtains in the courts, a rule to show cause why he should not be adjudged in contempt for the past offense charged in the recital of the resolution. The final adjudication of the fact of contempt with the imposition of punishment then depends upon the answer and attitude of the accused witness when he appears at the Bar of the Senate.

The essential difference between the positions taken by respondent and by petitioners is the latter's denial that the Senate had passed any judgment of contempt, the warrant of arrest being in the nature of a subpoena only. The respondent's position is that the preliminary charge of contempt for a past contumacy was initiated when the Senate passed Resolution 179.

The Circuit Court of Appeals sustained respondent's position, as the following excerpt from the opinion of Buffington, C. J., will confirm:

> "An examination of the proceedings shows that this is not the case of a person who refused to obey a subpoena to appear before the Senate, as was the fact in McGrain v. Daugherty, 273 U. S. 135, but of a witness who has duly twice appeared before a committee of the Senate and submitted himself to examination, but has rightfully or wrongfully declined to answer certain questions then asked. *The record shows that such refusal to answer certain specific questions was the sole ground of Cunningham's arrest. To contend the warrant of arrest was a subpoena to appear and testify, and not an arrest for contempt after he had duly appeared is to ignore the real situation. If the warrant of arrest is not based on the witness's alleged contempt in refusing to answer the questions propounded by the committee, it has no ground justifying its issue, for he did duly appear.*" (Rec. 67)

Woolley, C. J., adopts the view of petitioners in the following language:

> "As I read the record there was no such adjudication for contempt. There was nothing more than a recommendation by a committee that the Senate adjudge him in contempt. On that recommendation the Senate did not act. In truth, the Senate has neither tried nor convicted Cunningham for contempt. *Nor has it indicated a purpose to try him. All it did was to authorize the issuance of a warrant of arrest, which * * * is the real beginning of the controversy here.*" (Rec. 70)

(3)

The above excerpt discloses the dissenting Judge's impression that the Senate did not adjudge Cunningham in contempt in accord with the Committee's recommendation that he be so adjudged.

The Brief for Petitioners, at the bottom of page 12, makes the similar erroneous statement of fact following:

> "The only possible basis for such an assumption (initiation of contempt proceedings) seems to be the recommendation that Cunningham be adjudicated in contempt, contained in the report of the Committee (Rec. p. 34) *upon which recommendation the Senate did not act*, and respondent's own fear and expectation that he would be adjudged guilty of a contempt."

While it is true that the 69th Congress expired without the Senate's action on the Special Committee's recommendation of February 28, 1927, that "Cunningham be adjudged in contempt", yet the fact also is that the Senate, *on March 22, 1928, at the first session of the 70th Congress and on the same day that the Special Committee made its final report, "insofar as Cunningham is concerned," wherein it renewed the recommendation in its report of February 28, 1927, in accordance with that recommendation, adopted Resolution 179.*

The recital of this resolution formally charged Cunningham with the contumacy alleged in the report and because of such contumacy, the resolution directed a warrant of arrest "to take into custody * * * and to bring Cunningham before the Bar of the Senate * * * or elsewhere * * * to answer questions pertinent * * * and to keep * * * Cunningham in custody to await (its) further order."

The Brief for Petitioners at top of page 13 says:

"The record shows that the Senate did not attempt to punish Cunningham for his contumacy, but instead, sent the Committee's report to the United States Attorney for the District of Columbia for proceedings under the Act of January 24, 1857 (11 Stat. 155), relating to the punishment of contempt as a crime (Rec., p. 45)."

This ignores the fact that the motion of reference as stated therein was because of the "contumacy of Thomas W. Cunningham—for appropriate action by that officer". (Rec. 45)

It is evident that the Senate has not only acted on, but has complied with the recommendation in the only two ways it could act and comply; i. e. initiating proceedings in contempt and for the statutory offense, because of the contumacy which it charged in the resolution ordering the arrest and stated in the motion of reference to punish under the statute.

The questions here involved may then be stated as relating to:

1. The nature and purpose of the Senate's action;

2. The jurisdiction of the courts to give relief;

3. The right of a court to transform the warrant into a subpoena and to ignore the jurisdiction of the Senate;

4. The power of the Senate to arrest respondent; and,

5. The existence of probable cause for the arrest.

1. THE NATURE AND PURPOSE OF THE SENATE'S ACTION:

The difference in the conclusions of the District Court and of the Circuit Court of Appeals results from their diversity of opinion as to the nature and purpose of the Senate's action.

The Senate either did or did not mean to say what it states as fact, and to consummate what it avows as the only purpose of its final report and the end of its final resolution.

Either the Special Committee meant, on March 22nd, 1928, to make, as by it stated, its "*final* report" to the 70th Congress, "in so far as Cunningham is concerned * * * and (to) renew(s) the recommendation * * * of February 28th, 1927 (69th Congress), that Cunningham be adjudged in contempt of * * * the Senate;" and the Senate *on the same day* meant to charge him with contumacy, because as recited in the preamble of its resolution 179, he "declined to answer certain questions" and further determined, as avowed in said resolution, "to take into custody * * * and to bring Cunningham before the Bar of the Senate * * * or elsewhere * * * to answer questions pertinent to the * * * inquiry * * * *and to keep* * * * (*him*) *in custody to await further order of the Senate*".

Or the Special Committee's report was not final, and the Senate did not charge him with contumacy and because thereof, order him to be arrested, taken before the Senate, and, pending purging proceedings, imprisoned *until its further order.*

In short, the warrant of arrest under which respondent is in custody is either the *initiating* process to punish for a contempt charged in the recital of the Senate resolution, which authorized the warrant pursuant to the recommendation of the Special Committee in its final report on Cunningham's alleged contumacy; or, the warrant is a process only to compel his giving future testimony by taking and holding respondent in custody, and as such is "the real beginning of the controversy here".

It is evident that the first of the above alternatives is in accord with, gives affect to, and is the necessary sequel of the past facts which called the warrant of arrest into existence; and that the second ignores the past alleged contumacy as charged and the possibility of its future punishment, as well as respondent's imprisonment from which habeas corpus alone released him.

It is also obvious as now admitted in Petitioner's Brief of Argument, page 42, that if the warrant under which respondent was arrested, was only to compel his giving *future* testimony, the pertinency of the questions which he refused to answer on two past examinations becomes irrelevant and immaterial in this habeas corpus proceeding, and can arise only if and after he has refused to answer and has been punished by formal commitment for contempt. (Petitioner's Brief of Argument, pages 37 and 38).

On this assumption the anomalous situation results that although it had twice recommended respondent be adjudged in contempt for his twice refusing to answer questions by it deemed pertinent, had recited his contumacy in the preamble of the resolution as the reason for his arrest

and ordered him in custody for such offense; yet the Senate may nevertheless continue to hold him in custody and deny the relevancy and materiality of the pertinency of the questions which gave rise to the instant habeas corpus proceeding which released him from custody, because it now avers that it did not charge him with contumacy or initiate contempt proceedings against him, asserting only its present purpose for a third time to ask respondent at the bar of the Senate, the same questions. Thus the Senate would imprison respondent and continue to hold him in custody for refusal to answer alleged pertinent questions and transfer the inquiry as to their pertinency from the past offense charged to a possible future offense, and postpone any inquiry whatever of pertinency until, and only if and after, his commitment and punishment for contempt.

Petitioners give no reason in support of this astounding position and make only the hesitant suggestion, (Brief for Petitioners, page 13) that:

> "The Senate may well have thought that although a witness should contumaciously refuse to answer embarrassing questions put to him by a Committee, he would feel differently when called to the Bar of Senate itself."

The statement of this suggestion should disclose its futility. It is neither consistent with the avowal of the Special Committee that its *final* report concerning Cunningham had been made, nor complimentary to the constancy of the Senate's determination as declared in the same report to adjudge him in contempt, nor in accord with its consequent accusation of contumacy. It is in utter disregard of respondent's imprisonment in initial execution of the Senate's avowed purpose, and in its final analysis, is a mere guess as to respondent's future conduct, with probabilities against fulfillment, since respondent twice

has refused to answer, and even if a correct guess, would neither in reason nor in law, warrant the conclusion in support of which the suggestion is made.

The only effect of an answer made at the Bar of the Senate by a contumacious witness is to purge himself of the contempt charged because of his past refusal to answer. It does not affect petitioner's insistence that the witness, *whether adjudged in contempt or not*, must remain in the custody of the Senate until he has appeared before its bar and there made answer at a time and in a manner pleasing to its will. It does not in any way mollify petitioner's harsh conclusion that a witness adjudged in contempt because of his refusal to answer questions by him deemed personal and not pertinent, by the Senate may be imprisoned until he shall answer at its bar. Finally, it does not change petitioners' fundamental proposition of law on which their position rests as stated in Brief for Petitioners, page 37, as follows:

> "If the Senate's questions to respondent are to be inquired into at all by a court, it can only be after they have been formulated and put to him at its bar, and he has refused to answer and has been committed to close custody until he shall answer."

The Senate here contends in accord with the conclusion of Dickinson, D. J., and the dissenting opinion of Woolley, C. J., that at the time of the arrest the courts are without jurisdiction in habeas corpus proceedings to pass on the power of the Senate to institute proceedings in contempt against an alleged contumacious witness, or to imprison a witness not contumacious for future examination; and that if such jurisdiction exists "at all by a court", it can only be invoked after he has refused at the bar of the Senate to answer and has been committed to close custody until he shall answer", i. e., *until he shall have been punished for a contempt.*

In Anderson vs. Dunn (1821) 6 Wheaton 204, this court in the first case wherein such question was suggested, announced the law to the contrary. In the first paragraph of the opinion of the court, Mr. Justice Johnson demonstrates that the power to institute a prosecution and the power to punish are so related as to make necessary the court's jurisdiction to inquire into the power to initiate the process in contempt as well as to punish the offense. He says on page 225:

> *"The duress complained of was sustained under a warrant issued to compel the party's appearance, not for an offense committed. Yet it cannot be denied that the power to institute a prosecution must be dependent upon the power to punish. If the house of representatives possessed no authority to punish for contempt, the initiating process issued in the assertion of that authority must have been illegal; there was a want of jurisdiction to justify it."*

Since that decision, it has uniformly been assumed by both branches of Congress and the courts, that the courts have jurisdiction to review the power of a legislative branch of government either to institute proceedings to compel appearance for an offense charged or to punish for an offense committed.

The jurisdiction so to inquire has arisen in habeas corpus proceedings on inquiry as to power to institute proceedings against the accused in

> Marshall vs. Gordon (1916) 243 U. S. p. 521;
> McGrain vs. Daugherty (1926) 273 U. S. p. 135,

and Matter of Stewart, Supreme Court of the District of Columbia, February 25, 1928, not reported;

in actions of trespass for false imprisonment in

Anderson vs. Dunn (supra) and
Kilbourne v. Thompson, 103 U. S. 168 (1880);

and in conviction under Section 102 of the Revised Statute, for refusal to answer questions, in

In re Chapman (1896) 166 U. S. 135.

In the above cases and particularly the three cases wherein habeas corpus proceedings were involved, the facts as to procedure were all similar to the instant case and such averment was made in Respondent's Traverse (Original 55, Print 44, 45). In each case a special committee was appointed to investigate. The committee reported the offense and recommended that the offender be adjudged in contempt. The legislative body thereupon adopted a resolution reciting the offense charged and directed its presiding officer to arrest and bring him to its bar and have him there make answer. Immediately upon the arrest and the accused, the writ of habeas corpus issued; and thus as in the instant proceeding, the issue was raised as to the power of the legislative body in the first instance to issue the warrant of arrest.

There was no final adjudication of contempt and imprisonment in any of the three cases. There was only the resolution authorizing the warrant and consequent arrest. The idea of a punishment appears only in any of the cases as incidental to the power in the first instance to initiate the procedure.

The consideration of the nature of the Senate's action should include a brief analysis of (a) the express words of the warrant, the preamble and the resolution which directed it to issue; as well as a short reference to (b) the absence of words showing an intention to summon a witness, and (c) the consequence of the arbitrary disregard of the express language of the resolution and warrant.

(a) *The words of the Recital, Resolution and Warrant.*

The Warrant was directed to the Sergeant-at-Arms of the Senate and was signed by the President of the Senate. It commended the former "in pursuance of the order of the Senate * * * to forthwith arrest and take into custody and bring to the bar of the Senate Thomas W. Cunningham." This is the language of physical detention of a body. It deprives the individual of his freedom of locomotion and this is its meaning and purpose.

The "order of the Senate," pursuant to which the warrant was issued was resolution 179 of the 70th Congress. It authorized and directed

> "that the President of the Senate issue his warrant * * * to take into custody * * * and to bring Cunningham before the bar of the Senate * * * or elsewhere * * * to answer such questions pertinent to the inquiry as the Senate * * * may propound, and to keep * * * Cunningham in custody to await further order of the Senate."

The authority here conferred is to "issue his warrant" and not to issue a summons, subpoena, request or direction, or any process to require attendance as a witness.

The body is to be taken into custody, brought to a designated place or "*elsewhere*" and shall be kept "in custody to await further order of the Senate:" If these words

are to be given their obvious meaning, the power is here assumed by the Senate to take the body of respondent, hold it in custody so long as it pleases, at any place, the bar of the Senate, or prison, as it may will.

The purpose of the arrest and detention is threefold, viz: "To bring Cunningham before the bar of the Senate," "to answer such questions pertinent," and "to keep Cunningham in custody", in event the answers by him made should by the Senate be deemed contumacious; i. e., *if he should not purge himself of the contumacy charged in the recital to the resolution.*

The recital to the resolution expressly accused respondent of contumacy by him committed in the 69th Congress; and it is this charge of a past offense that is given as the reason for the taking and holding in custody the witness.

This recital charges:

> "that * * * Cunningham twice called before the committee making inquiry * * * under Senate Resolution 195 of the 69th Congress, *declined to answer certain questions.*"

This is the language of direct accusation and is based on three previous reports of the Special Committee. The first report of the Committee was filed on December 22, 1926, which set forth in detail as to questions and answers the alleged contumacy of respondent.

The second report of the Committee was filed on February 28, 1927, and referred to its previous report as to the alleged contumacy and expressly recommended that "he be adjudged in contempt."

Both of these reports were made in the 69th Congress, but no action was taken by the Senate on the recommendation that "he be adjudged in contempt".

On March 22, 1928, at the first session of the 70th Congress, the Special Committee made its *final* report "inso-

far as Cunningham is concerned * * * and *renews the recommendation* made in its report of February 28, 1927, *that* * * * *Cunningham be adjudged in contempt.*"

In unambiguous language, the Committee has set forth in these reports the refusal of a witness to answer questions by it deemed pertinent to an inquiry, has termed such refusal "contumacious" and has recommended that the witness "be adjudged in contempt."

(b)—*The absence of words evidencing intention to summon a witness.*

Pursuant to this recommendation and on the same day, the Senate passed the resolution which initiated, by ordering the warrant of arrest, the proceedings in contempt against respondent for the offense of contumacy charged in the recital.

This conclusion follows in the knowledge that there is an entire absence both in the recital and in the resolution of any words indicative of a purpose to have the witness appear for the purpose of giving testimony.

There is no time or place given for the holding of a hearing for the purpose of receiving testimony, nor even of the purpose of the Senate to continue the inquiry or to make any inquiry, or that respondent is desired as a witness at any time or place, or for any purpose other than relating to the contumacy charged in the recital.

In this connection it should not be overlooked that the Special Committee disavowed a purpose further to examine respondent, when it filed its final report and recommended that he be adjudged in contempt because of his contumacy.

(c) *The consequences of the arbitrary disregard of the express language of resolution and warrant.*

The disregarding of the express words of the resolution and warrant of arrest and the treatment of the war-

rant as a subpoena or process to compel appearance as a witness does not relieve respondent of the legal consequences of the power of detention and imprisonment by the Senate asserted, for he is still under the duress of its custody. Nor do the consequences end with his possible imprisonment by the Senate under the power asserted, for if imprisoned, he must there remain until the Senate by its act releases him, or the court on habeas corpus proceeding, discharges him. But more grievous than either, the decision by the court of first instance that the warrant is a process to compel attendance, would, as hereinbefore pointed out, prevent the issue of pertinency being heard on habeas corpus proceedings until after the witness had appeared at the Bar of the Senate and then only and if the witness contumaciously refused to answer.

Such decision in the instant case would have held this respondent in prison pending the determination of the pertinency of the questions, if the Circuit Court of Appeals on special allocatur had not allowed bail to be entered after its refusal by the District Judge; and thus by calling a warrant of arrest a process to compel appearance, but giving it the effect of a warrant of arrest, petitioners would have held respondent in prison and denied legal inquiry into the contumacy charged until the final adjudication of contempt by the Senate.

Moreover, the decision that the warrant is a subpoena exposes the accused to the probability, and but for the Circuit Court of Appeals in the instant case, to the certainty, of his being compelled in two different courts, at two different times to ask relief on habeas corpus proceedings for the same reasons. If the Circuit Court of Appeals had affirmed the decision of the court of first instance, that the warrant was a process to appear, he would, upon a third refusal, to answer at the Bar of the Senate the questions by him deemed not pertinent, have been adjudged in contempt and

he would then have been compelled to institute proceedings in habeas corpus in the United States Court for the District of Columbia. There again by him would be urged, but for the first time passed upon, the question of the pertinency of such questions.

It is suggested that it does not contribute to the administration of justice between a state and its citizen, on a question involving his individual liberty, to resolve a doubt as to the jurisdiction of the court against the citizen and thus expose him to the certainty of being compelled to go to two different courts as well as to a possible refusal by another court to consider the fundamental matters by him urged in the first court in defense of his freedom from unlawful arrest.

Petitioners' argument as to the purpose of the Senate rests alone on the part of the resolution which directs respondent to "answer such questions pertinent to the matter * * * as the Senate * * * may propound;" from which they conclude that the warrant of arrest was in the nature of a subpoena, since "there was no word in either the resolution or the warrant about contempt." (Brief for Petitioners, page 18.)

It has been shown that the imputed intention alone to subpoena is contrary to the express avowal of the Senate not further to examine Cunningham as a witness and that the Senate has acted on the Committee's recommendation that respondent be adjudged in contempt. The inaccuracy of petitioners' repeated statement that contempt is not referred to in the resolution is obvious, for its recital charges the contumacy for which the Committee recommended his being so adjudged and it orders his arrest and detention therefore. Petitioners ignore the charge of contumacy and the taking and holding respondent in custody until the Senate's "further order."

Petitioners' distinction between a probable result and a real purpose is fanciful and the effort to impute to the

Circuit Court of Appeals their confusion is futile. (Brief for Petitioners, p. 18.)

The immediate and only purpose of the resolution is to initiate proceedings in contempt for the contumacy which it charges, to have him appear before the Senate and there make answer and upon such answer being made, either to punish him for his contumacy or to free him should he purge himself of the charge.

II.

THE JURISDICTION OF THE COURTS TO REVIEW THE POWER OF THE SENATE TO ARREST RESPONDENT IN INITIAL PROCEEDINGS BY IT INSTITUTED AGAINST HIM FOR CONTUMACY.

This is the broad and fundamental inquiry involved in this proceeding, as Woolley, C. J., states in the closing paragraph of his dissenting opinion:

> **"Turning to the general law on which I base my dissent, I am constrained gravely to state and emphasize my conviction that the action (as distinguished from legislation) of the Senate of the Congress of the United States, a constituent body of an independent department of the government, is not subject to review and annulment by the judicial department."**

The court of first instance held, petitioners now contend, and the dissenting opinion suggests that the courts are without jurisdiction in this habeas corpus proceeding to inquire either into the reasons which induced the Senate to take respondent into custody or its power to issue the warrant of arrest.

The fundamental error which runs through the opinion of Dickinson, D. J., and the petitioners' argument that the courts can not inquire into the pertinency of the questions propounded or to any matter which might affect the Senate's power to issue the warrant, is the assumption that the hearing in the instant habeas corpus proceeding is analogous to "removal proceedings".

Dickinson, D. J., says (Original 62, Print 48):

> "The closest analogue of which we know is that of the type of cases in which the relator is being held under process to enforce his attendance for trial before another Court and emphatically a Court of another and distant jurisdiction."

Both Dickinson, D. J., and Woolley, C. J., refused to pass upon or to consider either the pertinency of the propounded questions or any of the issues raised by respondent in this case as to the power of the Senate in the premises. The former says (Original 62, Print 48):

> "A number of other questions of grave importance and great interest have been argued. * * * Into none of them do we feel the call to go because we do not find them to be in the case. In the first place, the character of the questions which have been addressed to the witness is a matter into which we could not go without ignoring the very distinction which we have sought to draw. It is the distinction between the propriety of a relator being put upon trial and the merits of the case when tried. The latter must be judged by the trial Court; it is only the former upon which the Court in the Habeas Corpus hearing can pass."

It is suggested that "probable cause" in analogy to removal proceedings is not the question here involved; but, that the controlling inquiry on a writ of habeas corpus of one taken in custody by a legislative assembly is its authority or power to issue the warrant of arrest.

The American cases, Federal and State, are uniform in holding that a legislative body is not the final judge of its power and privileges in cases involving the rights and liberties of individuals; but the courts may discharge a relator on writ of habeas corpus arrested and detained without or in excess of legislative authority.

In this connection, the already quoted excerpt from the opinion of Mr. Justice Johnson in the earliest American case of Anderson vs. Dunn (supra, p. 24), should be kept in the mind; for it makes clear that the want of jurisdiction or power in the Senate may be inquired into at the time of the arrest, whether the warrant was issued to compel appearance or to inflict punishment:

The inquiry into the power of the Senate to institute proceedings for contempt involves fundamental principles of the structure of the Federal Government, the supremacy of the judiciary and the final determination of legislative power where the liberty of the individual is in jeopardy.

The jurisdiction of the courts to protect the individual against the arbitrary or unlawful assertion of the privilege of either branch of Congress preliminary to arrest or finally to commit and imprison for contempt has never by this Court been denied.

The Circuit Court of Appeals, following the law as stated by Mr. Justice Van Devanter in McGrain v. Daugherty, 1896, 273 U. S. 135, held:

That while the Senate may by arrest institute proceedings against a contumacious witness for contempt, yet the validity of the arrest may be inquired into by writ of habeas corpus, and a discharge granted if the warrant was unauthorized because in excess of the power or without the jurisdiction of the Senate.

This brief was in press when this court handed down its opinion April 9th, 1929, in Sinclair vs. United States of America, No. 555. The following excerpt from that opinion should here be inserted as the last utterance of this court in support of its jurisdiction to protect a citizen against the asserted power of a legislative tribunal to make arbitrary inquiries in respect to his personal and private affairs. Mr. Justice Butler referring to McGrain vs. Daugherty, supra, says:

> "And that case shows that, while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard for the rights of witnesses, and that a witness rightfully may refuse to answer where the bounds of the power are exceeded or where the questions asked are not pertinent to the matter under inquiry.

> It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs. In order to illustrate the purpose of the courts well to uphold the right of privacy, we quote from some of their decisions."

The learned Justice then refers among others, to the cases following.

In Kilbourn vs. Thompson (1880) 103 U. S., 168, all of the leading English cases are reviewed by Mr. Justice Miller, who says that:

> "the power to punish for contempt has been exercised by the House of Commons in numerous instances",

yet, this power, as by him pointed out on page 185, is

> "distinctly placed on the ground of the judicial character of Parliament, which is compared in that respect with the other courts of superior jurisdiction."

Mr. Justice Miller then states on page 185:

> "In the celebrated case of Stockdale v. Hansard (9 Ad. & E. 1), decided in 1839, this doctrine of the omnipotence of the House of Commons in the assertion of its privileges received its first serious check in a court of law."

He then adds, on page 186:

> "Lord Denman, in a masterly opinion, concurred in by the other judges of the King's Bench, ridicules the idea of the existence of a body of laws and customs

> of Parliament unknown and unknowable to anybody else but the members of the two Houses, and holds that an incontrovertible logic that when the rights of the citizens are at stake in a court of justice, it must, if these privileges are set up to his prejudice, examine for itself into the nature and character of those laws, and decide upon their extent and effect upon the rights of the parties before the court. While admitting, as he does in Case of the Sheriff of Middlesex (11 Ad. & E. 273), that when a person is committed by the House of Commons for a contempt in regard to a matter of which that House had jurisdiction, no other court can relieve the party from the punishment which it may lawfully inflict, he holds that the question of the jurisdiction of the House is always open to the inquiry of the courts in a case where that question is properly presented."

The learned Justice then refers, on page 187, to what he terms "the leading case * * * of Kielley v. Carson and Others (4 Moo. P. C. 63), decided in 1841"; and points out the fact that the opinion in this case was rendered by Mr. Baron Parke, and "seems to have received the concurrence of all the eminent judges (eight) named": and adds:

> "Measuring the weight of its authority by the reputation of the judges who sat in the case and agreed to the opinion, it would be difficult to find one more entitled on that score to be received as conclusive on the points which it decided."

Mr. Justice Miller then quotes the following from the opinion of Mr. Baron Parke, (page 188):

> "The dictum of Lord Ellenborough in Burdett v. Abbott, which dictum, * * * can not be taken as authority for the abstract proposition that every legislative body has the power of committing for contempt.

> **The observation was made by his Lordship with reference to the peculiar powers of Parliament, and ought not, we all think, to be extended any further. We all therefor * * * decide according to the principle of the common law that the House of Assembly have not the power contended for. They are a local legislature with every power reasonably necessary for the exercise of their functions and duties, but they have not * * * the same exclusive privileges which the * * * law * * * has annexed to the House of Parliament."**

It will be recalled that Kielley vs. Carson, (Supra), reached the question for the first time in the history of English jurisprudence, of the power of a legislative assembly existing under a colonial written constitution (in this case Newfoundland), to commit for contempt.

Mr. Justice Miller closes his review of the English case, with the statement that it was (page 189)

> "followed in the same body by Fenton v. Hampton (11 Moo. P. C. 347) and Doyle v. Falconer (Law Rep. 1 P. C. 328), in both of which, on appeals from other provinces of the kingdom, the doctrine of the case of Kielley v. Carson and Others is fully reaffirmed."

The learned Justice then reviews Anderson vs. Dunn, (Supra).

In this case, the defendant was committed because of his attempt to bribe a member. What was held in that case is stated by Mr. Justice Miller as follows (page 197):

> "But the court in its reasoning goes beyond this, and though the grounds of the decision are not very clearly stated, we take them to be: that there is in some cases a power in each House of Congress to punish for contempt: that this power is analogous to that exercised by courts of justice, and that is being the well-established doctrine that when it appears that a pris-

oner is held under the order of a court of general jurisdiction for a contempt of its authority, no other court will discharge the prisoner or make further inquiry into the cause of his commitment. That this is the general rule, though somewhat modified since that case was decided, as regards the relations of one court to another, must be conceded."

He says on page 197:

"But we do not concede that the House of Congress possess this general power of punishing for contempt. The cases in which they can do this are very limited, as we have already attempted to show. If they are proceeding in a matter beyond their ligitimate cognizance, we are of opinion that this can be shown, and we can not give our assent to the principle that, by the mere act of asserting a person to be guilty of a contempt, they thereby establish their right to fine and imprison him, beyond the power of any court or any other tribunal whatever to inquire into the grounds on which the order was made. This necessarily grows out of the nature of an authority which can only exist in a limited class of cases, or under special circumstances; otherwise, the limitation is unavailing and the power omnipotent."

He then points out on page 198:

"The case of Anderson v. Dunn was decided before the case of Stockdale v. Hansard, and the more recent cases in the Privy Council to which we have referred. It was decided as a case of the first impression in this court, and undoubtedly under pressure of the strong rulings of the English courts in favor of the privileges of the two Houses of Parliament. Such is not the doctrine, however, of the English courts today."

He then makes the following reference to the Massachusetts case of Burnham v. Morrissey, 14 Gray, 226, and the following excerpt from the opinion of Mr. Justice Hoar, concurred in by Mr. Chief Justice Shaw (page 199):

> "The house of representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. That house is not the legislature, but only a part of it, and is therefore subject in its action to the laws, in common with all other bodies, officers, and tribunals within the Commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme: and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void. The house of representatives has the power under the Constitution to imprison for contempt; but the power is limited to cases expressly provided for by the Constitution, or to cases where the power is necessarily implied from those constitutional functions and duties, to the proper performance of which it is essential."

He then closes his opinion with the following statement which uniformly since that time has been by this court declared as the law (pages 199-200):

> "*We must, therefore, hold, notwithstanding what is said in the case of Anderson v. Dunn, that the resolu-*

tion of the House of Representatives finding Kilbourn guilty of contempt, and the warrant of its speaker for his commitment to prison, are not conclusive in this case, and in fact are no justification, because, as the whole plea shows, the House was without authority in the matter."

With this review of the state of English and American law, the facts of Kilbourn vs. Thompson should be given:

Cook & Company went into bankruptcy. The United States had deposited considerable funds with them and was a creditor. Bankruptcy proceedings were in the State of Pennsylvania. The Trustee made a settlement of a real estate deal in the District of Columbia, which Congress thought was detrimental to the interest of creditors. The House of Representatives passed a resolution appointing a committee to investigate the details of the above settlement and summoned witnesses. Kilbourn was summoned and commanded to produce records. He appeared and refused to give testimony as to the members of Cook and Company and to produce his records. He was adjudged in contempt and imprisoned for forty-five days. He brought action for false imprisonment under the above facts. The Court held that his plea was insufficient.

Mr. Justice Miller states the law, which is particularly applicable to the present inquiry, as follows:

"Whether the power of punishment in either House by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and *we feel equally sure that neither of these bodies possess the general power of making inquiry into the private affairs of the citizen.*"

The learned Justice then proceeds to inquire into the nature of the duties imposed on the committee, and makes the possibility of legislation the test of authority, in the following language:

> "Can the rights of the pool, or of its members, and the rights of the debtor, and of the creditor of the debtor, be determined by the report of a committee or by an Act of Congress? If they cannot, what authority has the House to enter upon this investigation into the private affairs of individuals who hold no office under the government."

He then concludes:

> "We are of opinion, for these reasons, that the resolution of the House of Representatives authorizing the investigation was in excess of the power conferred on that body by the Constitution; that the committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the House, and the warrant of the speaker, under which Kilbourn was imprisoned, are, in like manner, void for *want of jurisdiction in that body, and that his imprisonment was without any lawful authority.*"

Marshall vs. Gordon (1916) 243 U. S., 521, follows the law as announced in Kilbourn vs. Thompson, (Supra); *and is the first case which released the relator on habeas corpus proceeding, reversing the court below which remanded the relator.* That case is peculiarly important because of the careful analysis of principles, the differentiating between the different kinds of legislative contempt, segregating them into distinct classes, and announcing the distinction between the power to punish by general law, as a crime, a contempt committed and its summary punishment by imprisonment by the legislative body

In that case, the District Attorney of New York started proceedings before the grand jury for indictment for violation of Anti-Trust Laws and members of Congress was indicted. The same member started impeachment proceedings and a committee was appointed to investigate the district attorney. In the course of their investigation, the district attorney wrote a letter which was published in which he said the object of the committee was to investigate the grand jury and not him. He was then charged with contempt and warrant of the House issued for his arrest. Habeas corpus denied, but decision was reversed by the Supreme Court and the relator was freed.

Mr. Chief Justice White, in the opinion of the court, then refers to what was decided in Kilbourn vs. Thompson, (Supra) at p. 537:

> "In Kilbourn v. Thompson, (Supra), which was also a case of false imprisonment for arrest under a warrant issued by order of the House in a contempt proceeding, although *the want of right of the House of Representatives to exert the judicial-legislative power possessed by the House of Commons was expressly reiterated, the question was reserved as to the right* to imply an authority in the House of Representatives to deal with contempt as to a subject-matter within its jurisdiction, *the particular case having been decided on the ground that the subject with which the contempt proceedings were concerned was totally beyond the jurisdiction of the House to investigate.*"

He then says (page 536):

> "*No power was expressly conferred* by the Constitution of the United States on the subject *except that given to the House to deal with contempt committed by its own members, Article 1, Section 5.*"

He then points out that the power to commit is an implied power; and on page 541, says:

> "It is a means to an end, and not the end itself. *Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted.*"

He then refers to Anderson vs. Dunn, (Supra), in which case

> "in answering the question what was the rule by which the extent of the implied power of legislative assemblies to deal with contempt was controlled, it was declared to be *'the least possible power adequate* (61 L. ed.) *to the end proposed'* (6 Wheat. 231, 5 L. ed. 248), which was but a form of stating that as it resulted from implication, and not from legislative will, *the legislative will was powerless to extend it further than implication would justify.*"

In re: Chapman, 1896, 166 U. S. 661, relator was not committed for contempt summarily by the Senate, but was convicted of the crime defined by Section 102 of the Revised Statutes for refusal to answer questions before the committee of the Senate. The resolution of the Senate recited that certain of its members during the consideration of tariff on sugar were speculating on the market in sugar stocks and were yielding to corrupt influences. Relator was a broker and was asked to produce his books showing his customers, with a view to ascertaining whether any Senators were speculating.

This Court, in the opinion by Mr. Justice Fuller (page 667), decides that the two Houses of Congress have jurisdiction, in the following language:

> "It is true that the reference is to 'any' matter under inquiry, and so on, and it is suggested that this is fatally defective because too broad and unlimited

in its extent; but nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible, so as to avoid an unjust or absurd conclusion, *and we think that the word 'any' as used in these sections, refers to matters within the jurisdiction of the two Houses of Congress before them for consideration and proper for their action; to questions pertinent thereof; and to facts or papers bearing thereon.*"

The following reference is made to Kilbourn vs. Thompson (Supra) which is particularly applicable to the facts of the instant case, as well as the differentiating facts of the Chapman case, from the case at bar at p. 668:

"In Kilbourn vs. Thompson, 103 U. S. 188, among other important rulings, *it was held that there existed no general power in Congress or in either House to make inquiry into the private affairs of a citizen; that neither House could on the allegation that an insolvent debtor of the United States was interested in a private business partnership, investigate the affairs of that partnership, as a mere matter of private concern,* and that consequently there was no authority in either House to compel a witness to testify on the subject. The case at bar is wholly different. Specific charges publicly made against senators had been brought to the attention of the Senate, and the Senate had determined that investigation was necessary. *The subject-matter as affecting the Senate was within the jurisdiction of the Senate. The questions were not intrusions into the affairs of the citizen. The questions were undoubtedly pertinent to the subject-matter of the inquiry.*"

In McGrain vs. Daugherty, (273 U. S. 135) The witness refused to honor the subpoena and denied the Senate's power to compel his attendance as a witness.

Mr. Justice Van Devanter reviews the four cases referred to in this paper book and reaches the following general conclusions as "entirely sound" at p. 173:

> **(1) "One, that the two houses of Congress in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective";**
>
> (2) "and, the other, that neither house *is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied.*"

The court then held (page 174):

> (3) "That the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function";

but makes the following statement of admonition to a legislative assembly and of remedy to a witness who is exposed to unlawful usurpation or improper interrogatories (page 176):

> "We must assume, for present purposes, that neither house will be disposed to exert without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in Kilbourn v. Thompson and Marshall v. Gordon point to admissible measures of relief. And it is a necessary deduction from the decisions in Kilbourn v. Thompson and Re Chapman that a witness *rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.*"

The learned Justice, before reviewing the decisions of the United States Courts, refers to the case of People ex rel. McDonald v. Keeler, 99 N. Y., 463, wherein the following quotation is made on page 378 from the earlier case of Wilckens vs. Willet, 1 Keyes, 521, in speaking of the power of legislative assemblies to commit for contempt:

> *"It is a limited power, and should be kept within its proper bounds; and, when these are exceeded, a jurisdictional question is presented which is cognizable in the courts."*

Mr. Justice Van Devanter gives the following resumé of the facts and what was decided in Kilbourn vs. Thompson, (supra) which is particularly applicable to the facts of the present application, because, as by him indicated, the matter in that case *"was one in respect to which no valid legislation could be had."* He says, on page 170:

> "The next decision was in Kilbourn v. Thompson. • • • The question there was whether the House of Representatives had exceeded its power in directing one of its committees to make a particular investigation. The decision was that it had. *The principles announced and applied in the case are—that neither house of Congress possesses a 'general power of making inquiry into the private affairs of the citizens'; that the power actually possessed is limited to inquiries relating to matters of which the particular house 'has jurisdiction' and in respect of which it rightfully may take other action; that if the inquiry relates to 'a matter wherein relief or redress could be had only by judicial proceeding', it is not within the range of this power, but must be left to the courts."*

The discussion of the right of the citizen to invoke the writ of habeas corpus against an arbitrary assumption of

power by a legislative branch of Congress should close with the following statement of fundamental principles from the opinions of Mr. Justice Harlan in Interstate Commerce Commission vs. Brinson (1893) 154 U. S. 478 and Tindal vs. Wesley (1896) 167 U. S. 217. In the former opinion, at page 478, the learned Justice says:

> "We do not overlook those constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department still less any merely administrative body, established by Congress, possesses or can be invested with a general power of making inquiry into the private affairs of the citizen. 479 Kilbourn v. Thompson, 103 U. S. * * * We said in Boyd v. United States, 116 U. S. 616, * * * and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employees of the sanctity of a man's home, and the privacies of his life. As said by Mr. Justice Field in Re Pacific R. Commission, 32 Fed. Rep. 241, 250, 'of all the rights of the citizens, few are of greater importance, or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others could lose half their value."

It is then suggested the following general principles may be concluded from the decisions of this Court reviewed in the preceding pages of this paper book.

That "no power was expressly conferred by the Constitution of the United States on either branch of Congress to deal with contempt", except that "committed by its own

members"; that the power to commit individuals, not members, arises from "the implication that the right has been given to do that which is essential to the execution of some * * * authority expressly conferred"; that it "rests solely on the right of self-preservation"; is limited to "the least possible power adequate to the end proposed;" should be "kept within its proper bounds"; and when these are exceeded, "a jurisdictional question is presented cognizable in the courts by writ of habeas corpus".

A fundamental corollary, applicable to the instant proceeding, may also be gathered from the principles just stated:

That "neither house is invested with general powers to inquire into the private affairs of a witness, but only such limited power of inquiry as is necessary in the exercise of a legislative function."

III

THE RIGHT TO TRANSFORM THE WARRANT OF ARREST INTO A PROCESS TO COMPEL APPEARANCE, AND TO IGNORE THE POWER OF THE SENATE TO ISSUE THE WARRANT.

The Circuit Court of Appeals reversed the District Court because of its refusal to consider the jurisdiction of the Senate either from the viewpoint of its power to arrest and keep in its custody until its "further order" a witness who has disobeyed no subpoena and against whom no process or appearance was outstanding; or from the viewpoint of its authority, to charge with contumacy and arrest as the first step in contempt proceedings, a witness who refused to answer questions deemed by him as inquisitorial of his private affairs.

This summary refusal to consider the pertinency of the questions propounded and out of which this entire controversy arose, the disregarding of respondent's arrest and detention, and the consequent ignoring of the issues suggested by respondent as involving his personal liberty, by the court of first instance, was made because that court adopted the contention here urged by petitioners, that the warrant of arrest was in the nature of a subpoena or process to appear as a witness.

The transforming of the warrant into a process to appear is (1) without precedent, (2) violative of the Constitution of the United States, (3) opposed to the practice which obtains in all courts, and (4) contrary to the precedents of both Houses of Congress.

(1)

THE TRANSFORMING OF THE WARRANT OF ARREST INTO A PROCESS TO APPEAR IS WITHOUT PRECEDENT.

A careful and diligent search has disclosed no authority of writer of text-book, encyclopedia or any treatise on law, or of the decisions of any federal or state court which has taken to itself the function of transforming a warrant of arrest into a subpoena to compel attendance of a witness, or which has construed that a warrant or attachment of arrest for contumacy charged, is in the nature of a process to compel attendance of a witness.

Petitioners, however, contend that McGrain vs. (1926) 273 U. S. 135, is authority for their position and "on all fours with the instant case". Brief for Petitioners (pages 31-32) says:

> "The Circuit Court of Appeals made the distinction that in the Daugherty case the witness has been subpoenaed and had refused either to appear or to testify, *and that in this case the witness had appeared, but had refused to testify.* It made this distinction available to respondent by the further holding that a duly issued 'subpoena served on him and neglect on his part to appear constitute the prerequisite preliminaries before an attachment for non-attendance issues.' • • •
>
> The position of the Circuit Court of Appeals reduces itself to this: that if respondent appeared before the committee, even though he refused to answer

a single question, the subpoena would have been obeyed. This ignores the fact that the command of the subpoena is two-fold: to appear, and to testify."

It is suggested that the Circuit Court of Appeals did not so differentiate the cases, for such distinction is absurd. The obvious distinction between these two cases flows from two differentiating facts which petitioners consistently and persistently ignore in their statement of facts, or "Questions Presented" and in several phases of their argument. These facts are:

(1) Daugherty refused to honor the subpoena and denied the Senate's power to compel his attendance as a witness. Cunningham obeyed every subpoena of the Senate, twice testified before the Committee, disobeyed no subpoena and made clear his willingness at the hearing in the court of first instance, to obey any subpoena that might be served on him, volunteering forthwith to appear upon the withdrawal of the instant warrant of arrest and the service of a subpoena.

(2) Cunningham twice testified before the Committee fully and in detail as to all matters deemed by him legally within the scope of the Committee's authority and refused to testify only to such questions as were by him deemed not pertinent to the inquiry. Daugherty neither appeared nor testified.

It is evident that in the Daugherty case, the contumacy charged was the refusal to honor the subpoena and that no question of pertinency of propounded questions arose; while in the Cunningham case, the contumacy charged was the refusal to answer specific questions of disputed pertinency, and that no question of the Senate's power to compel attendance was involved.

The Daugherty case held that the subpoena being dishonored by refusal to appear, the warrant of arrest

was "an auxiliary process to compel him to give the testimony sought by the subpoena."

The Circuit Court of Appeals, held that Cunningham had made full and specific answer to every question, propounded within the scope of the inquiry; and that the questions which he refused to answer were not pertinent to the inquiry.

The power to compel appearance by auxiliary warrant of arrest, with no issue as to pertinency of testimony, was decided in the Daugherty case. The power to initiate proceedings to adjudge in contempt a witness who has answered all questions except those of disputed pertinency is the issue here presented.

The following excerpt from the opinion of Mr. Justice Van Devanter, in the Daugherty case is the language on which petitioners rely as here controlling. (Page 4 Petitioner's Reply Brief in Support of Petition for Certiorari.)

> "The warrant was issued as an auxiliary process to compel him to give the testimony sought by the subpoenas; and its nature in this respect is not affected by the direction that his testimony be given at the bar of the Senate instead of before the Committee. If the Senate deemed it proper in view of his contumacy to give that direction it was at liberty to do so." (273 U. S., at p. 158.)

If this excerpt is read in connection with its context, the differentiating facts as above stated between the two cases will be made clear. This Court says (at p. 152):

> "The witness, (Daugherty) also points to the provision in the warrant and in resolution under which it was issued requiring that he be 'brought before the bar of the Senate, then and there' to give testimony 'pertinent to the subject under inquiry,' and contends that an essential prerequisite to such an attachment

was wanting, because he *neither had been subpoenaed to appear and testify before the Senate nor had refused to do so.* The argument in support of the contention proceeds on the assumption that the warrant of attachment '*is to be treated precisely the same as if no subpoena had been issued by the committee, and the same as if the witness had not refused to testify before the committee.*' In our opinion the contention and the assumption are both untenable. The committee was acting for the Senate and under its authorization; *and therefore the subpoenaes which the committee issued and the witness refused to obey are to be treated as if issued by the Senate. The warrant was issued as an auxiliary process to compel him to give the testimony sought by the subpoenas;* and its nature in this respect is not affected by the direction that his testimony be given at the bar of the Senate instead of before the committee. If the Senate deemed it proper, in view of his contumacy, to give that direction it was at liberty to do so."

It is evident in McGrain vs. Daugherty, supra, the effort of Daugherty was to make out a case similar to that which is presented in the instant proceeding, namely a warrant of arrest issued without disobedience of any previous or outstanding process. This court held the assumption untenable; and said that because the witness had refused to obey the subpoena, "the Senate had power to issue the warrant of arrest, and as an auxiliary process to compel him to give the testimony sought by the subpoenaes."

The second of the above differentiating facts is then adverted to by Mr. Justice Van Devanter, at page 160 where he points out the question presented in McGrain vs. Daugherty, supra, was not the pertinency of specific questions propounded as in the instant case, but rather

"the Senate's power to interrogate him even if the questions propounded be pertinent".

> "The other is that we are *not* now concerned with the right of the Senate to propound or the duty of the witness to answer specific questions, for as yet no questions have been propounded to him. He is asserting—and is standing on his assertion—*that the Senate is without power to interrogate him, even if the questions propounded be pertinent and otherwise legitimate—which for present purposes must be assumed.*"

Mr. Justice Van Devanter at page 156 makes the following answer to the contention that the warrant in that case was without "probable cause supported by oath" (the 4th Amendment to the U. S. Constitution).

> "The committee was a part of the Senate, and its members were acting under their oath of office as Senators. The matters reported pertained to their proceedings and were within their own knowledge. They had issued the subpoenaes, had received and examined the officer's returns thereon (copies of which accompanied the report), *and knew the witness had not obeyed either subpoena or offered any excuse for his failure to do so.*"

The learned Justice refers to the practice in judicial proceedings in analogy at page 157.

> "This is illustrated by the settled rulings that courts in dealing with contempts committed in their presence may order commitments without other proof than their own knowledge of the occurrence, and that they may issue attachments, based on their own knowledge of the default *where intended witnesses or jurors fail to appear in obedience to process shown by the officer's return to have been duly served.*"

It is suggested that the conclusion of the Circuit Court of Appeals is in accord with McGrain vs. Daugherty, supra; and that the opinion of Mr. Justice Van Devanter points out and clearly states the two essential facts which differentiate the two cases.

The Matter of Stewart, Habeas Corpus No. 1488, District of Columbia, Filed February 25th, 1928, not yet reported, is also suggested as authority for petitioners' position. Respondent respectfully submits that it is a precedent which supports his position.

Petitioner contends that the process is for an attachment to testify, and as such the pertinency of the questions respondent refused to answer is immaterial.

Bailey, D. J., sustains respondent's position that the refusal to answer pertinent questions was an act of contempt as the following excerpt from his opinion shows:

> "If the Committee was seeking information as a basis for legislation by Congress and if the questions asked the petitioner were pertinent to such inquiry and did not invade any of his constitutional rights, it was his duty to answer, and his refusal to do so could be treated as an act of contempt of the Senate."

The Senate could have adopted one of two courses for its punishment, i. e. (a) forthwith committment, or (b) appearance with opportunity to purge himself; as the following excerpt from the next sentence of the opinion shows:

> "The senate might thereupon have had him attached to be brought before the bar of the Senate to answer for his contempt, as has been done in several cases, but instead took a more lenient course in having him brought before the bar of the Senate to answer such pertinent questions as might be asked him there."

He then makes clear in the succeeding sentence that appearance was ordered at the Bar of the Senate "to purge himself of his contempt by giving his testimony before

the Senate instead of being brought before its Bar for punishment".

> "There was no question but that he had refused to answer as reported by the Committee, and he has no ground to complain that he was to be given an opportunity to purge himself of his contempt by giving his testimony before the Senate instead of being brought before its bar for punishment. The attachment could properly be based on his recalcitrant conduct as a witness before the Committee."

The court having answered the immediate question as to whether the Senate had the right to initiate the proceedings for the contumacy charged, logically approaches the second question involved as to whether respondent legally stood on his constitutional rights in his refusal to answer. This involved the real and controlling question as to whether or not the questions propounded were pertinent to the inquiry. After full discussion of this question, he concludes that

> "These questions were clearly relevant to the inquiry and involved no question of privilege."

It is evident then that Bailey, D. J., did not conclude that the process in that case was held to be merely an attachment to testify, for in such case there would have been no occasion for his considering the question of pertinency; since "the pertinency of the questions respondent refused to answer is immaterial". Nor would the court have adverted with great care to the opportunity which was given the respondent to purge himself of his contempt. The distinction which that court constantly kept in mind was between *final* proceedings in contempt *without* opportunity to purge and proceedings *to punish after an opportunity had been given to purge.*

(2)

THE TREATING OF THE WARRANT AS A PROCESS TO COMPEL ATTENDANCE OF A WITNESS AND TO TAKE AND HOLD HIS BODY WITHOUT OUTSTANDING PROCESS OR "WITHOUT PROBABLE CAUSE" VIOLATES ARTICLE IV AND IS NOT "DUE PROCESS OF LAW" UNDER ARTICLE V OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Article IV of the Amendments to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, *and no warrants shall issue, but upon probable cause supported by oath or affirmation*, and particularly describing the place to be searched and the persons or things to be seized."

Article V of the Amendments to the Constitution, inter alia provides that "no person shall be * * * deprived of life, liberty or property without due process of law."

Petitioners in their argument (p. 46) state that respondent argues that the fourth amendment to the constitution was violated because unsupported by oath or affirmation. Respondent makes no such contention, but respectfully submmits that the amendments to the constitution are violated because the warrant of the arrest was issued "*without probable cause;*" whether the same be construed as the initial process in contempt proceedings or as a subpoena to compel the attendance of a witness—the former because the propounded questions are not pertinent, the latter, because he has obeyed every, and is willing to obey any subpoena and the arrest is not "*auxiliary*" and supplemental, but original process.

Petitioners' Reply Brief in Support of Petition for Certiorari (pages 5 and 6) quotes the following excerpt from the opinion of the District Judge:

> "The preamble to the resolution which has been made the subject of severe criticism on other grounds, we read as a mere statement of the facts which in the sound discretion of the Senate justified the issuance of an attachment rather than a subpoena. That the Senate did not misjudge the attitude of the relator was confirmed by an incident of the habeas corpus hearing. Anticipating the point might be made and to definitely get it out of the way, if not to be raised, the relator was asked * through his counsel if he would give assurance of his attendance if the warrant of arrest or attachment were treated as a mere subpoena. The answer was an emphatic negative. We find no fault with this answer as we interpret it as the wish of the relator (as is his right) to ask the judgment of this court upon the question of the lawful power of the Senate to enforce his attendance as a witness, in the language of the resolution, to testify in answer to such pertinent and proper questions as might be addressed to him. Our answer is that the Senate does possess this power." (Rec., pp. 52-53.)

In order to prevent the erroneous inferences that (1) respondent was unwilling to obey a subpoena or (2) that he questioned 'the lawful power of the Senate to enforce his attendance as a witness," which might arise from the above excerpt, counsel for respondent in the brief of argument filed in the United States Circuit Court of Appeals, quoted the above excerpt, and referred to it as the seventh of the errors which prefaced his argument.

The following is an excerpt from page 28 of "Appellant's Brief of Argument."

"7. *Erroneous interpretation of appellant's refusal to treat warrant as a subpoena.*

The learned Trial Judge closes his opinion with reference to an incident which occurred at the trial and by him expressed as follows (above excerpt).

Counsel for appellant objected to the warrant being considered as a subpoena, not because of a desire to have passed upon 'the question of the lawful power of the Senate to enforce his attendance as a witness,' for this was never disputed; but because counsel denied the power of the court thus to modify the resolution of the Senate and its warrant, and yet, under it to direct appellant's arrest and detention, i. e., to call the process a subpoena but to permit its use as a warrant of arrest. He denied the power and jurisdiction of the Senate in the premises. But counsel made clear the willingness of appellant to obey any subpoena that might be served on him by the 70th Congress, volunteering forthwith to appear upon the withdrawal of the instant proceedings and the service of a subpoena."

The only facts or reasons which petitioners assign as showing probable cause are stated on page 36 of their brief as follows:

> "It is clear that the fact that the person arrested is a material witness in a case involving the interests of the people or of the Government, is sufficient cause. But even were more needed, the contumacy of the witness at his hearings before the committee and the difficulty found in serving a subpoena on him for his first examination (Rec., pp. 13-14, 21-22) should be more than sufficient cause.

The first sentence of the above excerpt is but a bald assertion that because the Senate has made the arrest, probable cause exists in the absence of facts showing its existence. "The contumacy of the witness at his hearings" ignores the fact that the District Court held and petitioners now contend that the courts are without jurisdiction to inquire into the pertinency of the questions on which the contumacy was predicated and that the Circuit Court of Appeals has held that the questions were not pertinent and the respondent was not guilty of contumacy.

The suggestion of difficulty "in serving a subpoena on respondent for his first examination" is neither persuasive nor fair, for it assumes attempted evasion contrary to the fact, disregards his twice appearing and in the opinion of the Circuit Court of Appeals giving full and specific answer to every question within the scope of the inquiry and ignores the offer made by respondent in his pleadings, petition and traverse (Original 3, 55, Rec. 2, 42) and at the hearing to obey any subpoena that the Senate might at any time issue.

Dickinson, D. J., makes the following admission as to the law, and forceful statement as to what should be respondent's relief which nevertheless he refuses to grant:

"It is undeniable that the ordinary process to secure the attendance of a witness is by subpoena and that there is as a matter of common practice no resort in the first instance to attachment. The choice of the process, however, and when an attachment may issue is a matter resting in the sound discretion of the Court issuing the writ. *Any person who was willing to attend as a witness and to testify and who had given no indication of any intention to evade the service of a subpoena or to disobey its mandate but who without any justification was served with an attachment without excuse for the employment of physical force to drag him to the witness stand, would assuredly be given a sympathetic hearing by any Court, if he asked to be relieved from imprisonment. He could fairly and hopefully raise the question of the lawfulness of the curtailment of his freedom.*"

Respondent here presents every essential, which in the judgment of that court entitles him to "sympathetic hearing" in his application "to be relieved from imprisonment". He has never refused to attend any hearing; has never been asked or subpoenaed to appear before the 70th Congress and has always been willing to appear as a witness.

What justification then can there be for casting such a witness in prison? What right has a Court arbitrarily to transmute a warrant into a subpoena? To what Court may respondent turn for relief "from imprisonment," if not the Court of first instance? By what logic may the euphonizing of the word "warrant" into a "subpoena," or an "arrest" into an "attachment," give sanction to the taking and detention of respondent, for by whatever name called, the legal effect is the same—he is held in custody.

In its final analysis, the District Court held and petitioners now contend that the Senate of the United States has the power to arrest a witness without anything but its own arbitrary will or declaration to sustain the arrest; and particularly, in this case, has exercised power against a witness who has obeyed every subpoena and has neither been requested nor summoned to appear at any time or place.

The power here asserted is that of the King of France, and later of his Council, to imprison under letters bearing his seal, any citizen who might be the victim of his arbitrary will. It is the same in form and effect as the Privy Council of England, sitting in its Star Chamber, arrogated to itself in the arbitrary assertion of a king's prerogative. It is similar to the Writs of Assistance which James Otis denounced as the "worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book." It is a power that strikes at the most precious possession of the individual,—his liberty of locomotion, his freedom from all restraint save that of law.

Lettres de cachet, when originally used, served a worthy purpose in the suppression of scandal and the maintenance of order; but their abuse was one of the contributing causes which led to the overthrow of a kingdom and the loss of a king's head. Mirabeau, a victim of such letters, from his prison cell, wrote in his essay the sentence of their doom.

Under the Tudors, the Privy Council with its associates in the Star Chamber likewise rendered good service for both the king and the people in the administration of justice; but under the Stuarts, James and Charles converted this agency of welfare into an instrumentality of oppression, for imprisonment without information and in disregard of the forms of law made a mockery of liberty.

So in the present use of arbitrary power, let it be granted, contrary to the avowal of respondent to obey any subpoena, that the Senate in the use of the process to compel attendance, made a wise choice of the warrant of arrest. It is the possession of power here asserted, to take and hold in custody a citizen, at its will and in disregard of fundamental law, that is fraught not only with the possibility of its perversion to tyrannical uses, but with a certainty as fixed as the law of gravitation, of its ultimate use to whatever oppressions an autocracy may deem essential to its ends or necessary to its perpetuation.

The history of mans' struggle for individual liberty confirms the truth that the seed of the instrumentalities of tyranny is always planted in the fertile soil of original good intentions and watered by beneficent early uses. They become the jungle growth of oppression and the strangling vines of freedom, when man in his apathy ceases to be vigilant in the cultivation of those virtues which cut the root of arrogated power and hedge its assertion with those limitations and restraints of law, which speak as the dominant will of the nation.

A careful search discloses but two instances wherein a branch or department of government has attempted to exercise the arbitrary practice of imprisoning a free man in violation of the fundamental law of the land.

Both of these instances are referred to in Ex parte Field (1862) 5 Blatch. C. C. Rpr. 63. In that case, two orders were issued by the War Department of the United States, on August 8, 1862, one of which authorized *the arrest of "persons discouraging enlistments"*. His Honor Judge Smalley, on page 69, after referring to Articles four and five of the Constitution, says:

> "If there be any force in language, it appears to me too plain for discussion, that either the Constitu-

tion or the order must fall. Our revolutionary fathers having, after eight years of desolating war, achieved their independence of the British crown, were so jealous of their liberty, and so determined to protect it against any future encroachments of power, that they were not satisfied to leave it with the safeguards that appear in the Constitution which was submitted on the 17th of September, 1787; but, in 1789, they submitted to the several States ten amendments thereto, which were duly ratified before 1791, in order to give more certain and complete protection to the liberty and rights of the citizen. How futile were all their efforts, if the doctrine contended for in this case is to prevail. That liberty which they held so dear, and guarded with such jealous care, has much less protection than it had under the British crown."

(3)

A DILIGENT SEARCH DISCLOSES NO CASE WHEREIN A COURT HAS EVER ISSUED A WARRANT OR ATTACHMENT FOR THE ARREST OF A WITNESS, UNLESS FOR CAUSE SHOWN, e. g., REFUSAL TO APPEAR AFTER SUMMONS, EXCEPT UNDER STATUTES NE EXEAT.

Circuit Court Judge Buffington in the opinion of that Court says (page 67 print):

> "No case or proceeding has come to our attention either through counsel or independent research in which either branch of the Congress has exercised the power of attachment without the prerequisite opportunity given to a witness to appear in response to a subpoena—a course which, in our judgment, the case of McGrain v. Daugherty, supra, assumes should be followed, and where it is said 'The warrant was issued as an auxiliary process to compel him (the non-attending and duly subpoenaed witness) to give the testimony sought by the subpoena'."

The rule is expressed in Vol. 40 Cyc. pages 2172-73 as follows:

> "An attachment for non-attendance cannot issue unless, or until, the witness has been properly served with a subpoena, with a tender of fees and expenses when necessary, and has failed to appear in obedience to the direction thereof." See cases there cited and discussed.

Vol. 13 Corpus Juris, Section 93, page 68, points out that the attachment on a rule to show cause may issue against a defaulting witness, but only after "*he has been duly subpoenaed.*"

Text-book writers and the courts generally regard the power to compel the attendance of a witness who wilfully neglects to attend, by attachment, in analogy to a proceeding for contempt of court; and they all emphasize the necessity of showing the service of a subpoena as a condition precedent to the issuing of the warrant.

In Commonwealth vs. Shecter (1915) 250 Pa., 282, Mr. Justice Stewart emphasizes this essential of an attachment or arrest and expressly holds that:

> "It must be based fundamentally on a contemptuous disregard of the authority of the court."

The learned Justice, on page 289, says:

> "But the power here exercised goes far beyond, and is the assertion of a right, which, if it exist at all, must rest on express legislative authority. Nothing short of this will justify its exercise. The mere fact that it is a power not incidental to any other court whether created by the Constitution or legislation is sufficient in itself to convince of this. * * * The primary purpose of an attachment process is to vindicate the authority of the court out of which it issues by compelling obedience to its orders and decrees. * * * It is a proceeding for contempt. Lacking the contempt, or rather the charge of it, no attachment lies. It must be based fundamentally on a contemptuous disregard of the authority of the court. Now in this case it is not pretended that any order or decree had been made by the Municipal Court touching or concerning this respondent, either in person or property. That court was without jurisdiction over him in any way whatever when it assumed to attach him to answer a charge that he had failed to comply with an order and decree made against him by another and different court."

The Justice then quotes as follows from the opinion in the case of Penn vs. Messinger (1791) 1 Yeates 2: The courts "would not carry the system of punishment by attachment;" and closes his opinion, on page 290, as follows:

> "It is hardly necessary to repeat that legislative authority must be found for the exercise of such power by a court, otherwise it must be held to be illegal."

In Douglass-Co. vs. Simpson (1912) 233 Pa., 517, Mr. Justice Brown points out the perils in the use of an attachment as original process, without notice or contemptuous disregard of court order,—in short, peril of condemning to imprisonment one unheard. On page 519 he says:

> "It was issued upon the petition of the appellant, without previous personal notice to the appellee of the decree against him and without a rule to show cause why it should not issue. The general rule is well settled that a writ of attachment for the summary arrest and imprisonment of a party in a civil proceeding for contempt in violating an order or decree cannot issue without such previous notice as will afford him an opportunity of being heard. Damnatus inauditus is contrary to the general principles of judicial procedure. Cases of extraordinary emergency may, however, sometimes arise, and, when they do, a strict observance of the rule as to notice might defeat the ends of justice and lead to deplorable consequences. Such emergencies are very rare, but when they do occur, and satisfactory cause is shown, a court may, in the exercise of a sound discretion, dispense with notice and forthwith award an attachment: New Brighton & New Castle R. R. Co. v. Pittsburg, etc., R. R. Co., 105 Pa. 13. To bring itself within the

> exception to the general rule that required a previous personal notice to the appellee of the decree and a rule to show cause why an attachment should not issue against him for contempt, the appellant presented its petition to the court, below. * * * There was no averment in the petition that would have warranted the summary attachment upon which he was taken into custody by the Sheriff. An answer was filed to the petition and a motion made to vacate the order directing the attachment to issue. Upon full hearing, the court below, having been convinced that the writ had been improvidently issued, quashed it, and of this the appellant complains."

The action of the court below, in that case, was affirmed.

In Respublica vs. Duane (1807) 4 Yeates, 347, a subpoena issued for the attachment of a member of Congress, who previously had been subpoenaed as a witness and had disobeyed the subpoena. The court, in holding that the attachment would lie under proper conditions, pointed out the distinction between an attachment and a subpoena and based its conclusion on the difference between the two writs and stated that the attachment only issued after a subpoena had properly served and the circumstances justified. Mr. Justice Yeates says on page 347:

> "It cannot be asserted, that the service of a subpoena is in arrest. It is a mere notice to the party to appear and give testimony."

He accordingly concluded (page 348):

> "The course thereof which I shall pursue, will be to withhold the attachment, until proper case is shown justifying such a measure."

In this connection, reference should be made to Commonwealth vs. Carter, 11 Pick. (Mass.) 277 which holds that proceedings against witnesses who disobey summons duly served on them, are in reality proceedings to punish for direct contempts; and that in such cases, the warrant may issue at once.

See also Andrews vs. Andrews, 2 Johns. Cas. N. Y., 109.

In construing a provision in the Alabama constitution which gave to one accused of crime the right to compel the attendance of adverse witnesses by compulsory process, the Supreme Court of that State in the cases of

Sanderson vs. The State (1910) 168 Ala. 109;
Brand vs. The State (1915) 13 Ala. App. 390;

held that the accused was entitled only to the ordinary process by subpoena and not to the extraordinary process by attachment.

See also the following illustrative cases:

Ex parte Humphrey, 2 Blatchf. U. S. 228 Fed. Cas.;
Ex parte Beebees, 2 Wall. Jr., U. S. 127;
Burnham vs. Morrissey, 14 Gray (Mass.) 226.

Jones on Evidence (Civil Cases) Section 799 says:

"The mode of compelling attendance of a witness, who wilfully neglects to attend is by attachment for contempt of court. But before such proceedings can be had, it must be shown to the court that the subpoena has been properly and seasonably served, * * * it must also appear that the testimony proposed is material to the case."

The following excerpt is taken from Wigmore on Evidence, Vol. 4, 2nd Ed. Sec. 2199, page 663, for the purpose of pointing out considerations which to the mind of that

author make necessary legal notice of the time and place of attendance as a witness before his presence can be enforced by attachment of his person:

> "Common fairness prescribes that, before the witness be enforced to perform his testimonial duty, adequate and express notice be given him that the testimony is likely to be needed, and a formal summons be issued by the court to him to attend for the purpose. This process secures the effect, not only of notifying him when and where and in what sort of cause his testimony is wanted, but also of assuring him that the authority of state has sanctioned the demand, of furnishing him a voucher of proving his claim to indemnity (where it is not demandable in advance), as well as of satisfying the court, in case the witness is not present when called to stand, that due diligence has been used by the party to procure him and (in a contempt proceeding) that a default appears prima facie on his part."

But it is suggested that since the Senate is the sole judge of the elections, returns and qualifications of its *members*, the Senate has power to issue the warrant of arrest in analogy to the power conferred by Section 659, Title 28 of the United States Code (being Section 881 of the Revised Statutes) on "any judge of the United States" to "issue a warrant" for the arrest of a competent and necessary witness "on the trial of any criminal proceeding in which the United States are parties or are interested."

A reading of the following provisions of this Statute will disclose that Congress was careful to safeguard the rights of individuals against an arbitrary use of this extraordinary remedy by permitting its issuance only after formal application in open court had been made by the

District Attorney; and that the court was *"satisfied by proof that the testimony of any person is competent and will be necessary on the trial"*.

> "Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and, for that purpose, may issue a warrant against such person, under his hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. *If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein.* And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge."

This Act of Congress and also that of March 3, 1887, Chapter 397, Sec. 2, 24 Stat. at large 635, and Section 660 of the Code of Laws but emphasize and made clear not only that an attachment will not issue without a previous subpoena or to prevent the absconding of a material witness, but also the important and essential fact that statutory authority has been deemed necessary even in such instances to confirm it.

The Act of 1887 sets forth certain specific crimes, in the prosecution of which an attachment may issue without previous subpoena; and the implication is clear that the attachment may not issue in the prosecution of any other

crime except under the provisions of Section 881 of the Revised Statutes, Section 659 of United States Code, which provides:

> "In any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, whether before a United States commissioner, justice, judge, a grand jury, or any court, an attachment for any witness may be issued by the court, judge, or commissioner, without a previous subpoena, compelling the immediate attendance of such witness, when it shall appear by oath or affirmation, to the commissioner, justice, judge, or court, as the case may be, that there is reasonable ground to believe that such witness will unlawfully fail to obey a subpoena issued and served in the usual course in such case; and in such case the usual witness fee shall be paid to such witness so attached. The person so attached may at any time secure his or her discharge from custody by executing a recognizance with sufficient surety, conditioned for the appearance of such person at the proper time, as a witness in the cause or proceeding wherein the attachment may be issued."

The inference would be justifiable from petitioner's invoking the Revised Statute 881 in aid of his right to arrest, that the respondent or some person is here charged with a crime in which the United States is a party, when in truth and under the answer filed by the Sergeant-at-Arms of the Senate, respondent is charged with no crime, is guilty of no offence, having never been adjudged in contempt; and all that the Senate of the United States is asking, is that he shall be summoned, by the taking of his body, as a witness.

It would be a fair conclusion from petitioners' argument that the respondent has never appeared as a witness, has constantly evaded subpoenas and that a subpoena is

now outstanding for his attendance in some criminal proceeding in which the United States is a party; when the fact is that no subpoena is outstanding and never has any subpoena been issued which respondent has refused to obey.

It is stated that subsequent continued search shows no case wherein any court, federal or state, has permitted the arrest or attachment of a witness to compel his attendance, except where the element of disobedience or contempt of court order, after due notice, justifies, or express statutes, in nature ne exeat warrant.

(4)

NEITHER THE SENATE NOR HOUSE OF REPRESENTATIVES AT ANY TIME, HAS EVER ASSUMED THE POWER HERE ASSERTED BY THE SENATE TO ARREST AND BRING TO ITS BAR A WITNESS WITHOUT FIRST SUMMONING HIM BY SUBPOENA TO APPEAR.

The following is a complete statement of every case as collected by Hinds in his "Precedents of Congress," Vol. 3, pages 1 to 67, wherein a recusant witness was arrested and brought to its bar *after summons duly served.*

In the case of Charles W. Woolley, being Precedent No. 1685, the resolution recited that the accused

> "is now in custody of Sergeant-at-Arms on an attachment of contempt in refusing or neglecting to obey *summons* requiring him to appear and testify before the committee."

In re: Aaron Higgins, being Precedent No. 1687, the recital of the resolution set forth that:

> "On the 14th of March last a subpoena was issued by the Speaker summoning * * * Aaron Higgins * * * but that the said Higgins has * * * and still does refuse * * * to obey said summons."

The resolution authorized that:

> "The Speaker * * * be directed to issue his writ of attachment * * * and cause him to be brought to the bar * * * to answer as for his contempt in not obeying the said subpoena."

In re: Irwin, Precedent 1691, the warrant of arrest was ordered by the House, after the accused had failed to

obey a subpoena from a committee; and the House subsequently discharged him without formal arraignment.

In re: Barnes, Precedent 1695, the warrant of arrest was issued after the accused had refused to obey a subpoena duces tecum.

In Precedent 1698, the House of Representatives issued a warrant of arrest for contempt, members of a State Canvassing Board who refused to obey a subpoena duces tecum.

In re: Seward, Precedent 1699, a warrant of arrest issued for contempt, after refusal to obey a subpoena duces tecum had been served.

In Precedent 1701, the warrant of arrest in contempt was issued only after the subpoena had been served and disobeyed.

Precedent 1702, warrant of arrest was issued after the formal service of subpoena and a distinction made between the serving and returning of a subpoena and of a warrant for arrest.

In the following cases, warrant of arrest was issued only after refusal to obey an outstanding subpoena:

In re: Williamson, Precedent 1673;
In re: Latham, Precedent 1674;
In re: Connelly, Precedent 1676;
In re: Stevens, Precedent 1678;
In re: Hall, Precedent 1679;
In re: Wilson, Precedent 1680;
In re: Wikoff, Precedent 1684;
In re: Taylor, Precedent 1714.

In every other case where warrant of arrest issued, the witness refused to answer certain specific questions after he had disobeyed the subpoena.

It is submitted that a careful search discloses no precedent in either House of Congress wherein the power

was asserted by original in contra-distinction to auxiliary process to compel attendance by arrest and holding in custody the body of the witness.

This proposition should close with a statement of the alternative positions which may be taken in reaching a conclusion as to the merits of the propositions here involved.

Either the proceedings and resolutions of the Senate in the 69th Congress which gave rise to the final report and resolution and warrant issued pursuant to it by the 70th Congress, may be ignored; or these matters may be considered as an essential part of the recital, resolution and warrant. If it is concluded that the warrant on which relator was arrested, was issued pursuant to the resolution, and the resolution was passed because of the contumacy of the relator as a witness in the 69th Congress, as charged in its recital, then, in analogy to the precedents heretofore uniformly established by either branch of Congress, the resolution and warrant are initial proceedings in contempt and the preliminary step taken by the Senate to punish relator for a contempt committed in the 69th Congress upon his failure to purge himself of such offense.

If, however, the proceedings of the Senate in the 69th Congress as set forth in the report and charged in the recital of the resolution of the 70th Congress, are ignored, then it would seem to follow that the resolution and warrant are in the nature of original process to compel the attendance of a witness.

If the resolution and warrant are the initial proceedings in contempt for his contumacy and the preliminary steps in accordance with precedent for his punishment or purging, then the warrant is void and the arrest is illegal, because the Senate was without power and authority in the premises.

If, however, the warrant is in the nature of original process to compel relator's attendance as a witness, then the issuance of the warrant is an abuse of judicial process and an usurpation of power violative of the Constitution of the United States; and this because without "probable cause" in that (a) relator has never been requested nor subpoenaed by the Senate in the 70th Congress, to appear as a witness; (b) has obeyed two previous subpoenas of the Senate issued by it in the 69th Congress; (c) has never disobeyed any subpoena issued by the Senate at any time and (d) Finally, to arrest this relator on an original process without previous subpoena or request and hold his body "until further order of the Senate" is without precedent of either branch of Congress or of any State Legislature, for a diligent search discloses no case wherein, since Magna Charta, any tribunal, legislative or judicial, has arrogated to itself the authority, or asserted the power to issue its warrant of arrest to compel the attendance of a witness without previous subpoena served and contempt committed, except under express statutes, in nature ne exeat, and then only upon information under oath or proof of probable cause.

IV.

THE POWER OF THE SENATE TO ISSUE ITS WARRANT OF ARREST AGAINST RESPONDENT AND TO TAKE AND HOLD HIM IN CUSTODY.

This branch of the argument will be discussed under the following propositions in the order of their statement:

(1) The warrant is issued without probable cause because the record does not disclose respondent to be guilty of defiant and contumacious conduct as a witness before the Special Committee; (a) since he answered truthfully all relevant questions and (b) refused to answer only improper inquiries concerning his personal affairs.

(2) Neither the original resolution 195, nor its supplemental resolution 324 of the 69th Congress, nor Senate Resolution 10 of the 70th Congress, insofar as all or any related to the "nomination" of a senator, embraced or contemplated a subject-matter valid for the exercise of a legislative function; since the Senate declared Vare was not a member.

(3) The scope of the Special Committee functioning under Resolution 195, embraces a subject-matter under the authority of Newberry v. United States (1920) 256 U. S. 230, as to which there can be no valid legislation, and this because it relates to nominations of senators at the primaries.

(4) The Special Committee appointed under resolutions 195 and 324 expired at the conclusion of the 69th Congress; and that Committee, having reported to the Senate the alleged "contumacious conduct of * * * Cunningham", and having recommended that "he be adjudged

in contempt''; and the Senate having taken no action in the 69th Congress, upon the recommendation, is without power in the 70th Congress to punish for a contempt by the Senate admitted to have been committed in the preceding Congress.

(5) The revival of the Special Committee by resolution 10 of the 70th Congress confers no authority to commit Cunningham for a contempt by the Senate admitted not to have been committed in the 70th Congress, but in the 69th Congress; and this because there can be no imprisonment for a contempt beyond the Congress in which it was committed.

(I)

THE WARRANT IS ISSUED WITHOUT PROBABLE CAUSE BECAUSE THE RECORD DOES NOT DISCLOSE RESPONDENT TO BE GUILTY OF DEFIANT AND CONTUMACIOUS CONDUCT AS A WITNESS BEFORE THE SPECIAL COMMITTEE; (a) SINCE HE ANSWERED TRUTHFULLY ALL RELEVANT QUESTIONS AND (b) REFUSED TO ANSWER ONLY IMPROPER INQUIRIES CONCERNING HIS PERSONAL AFFAIRS.

The element of probable cause has been discussed in the preceding pages of this argument from the viewpoint that the transformation of the warrant of arrest into a process to compel appearance and to arrest respondent as if under an original process, violates the fourth amendment to the constitution because of the absence of facts showing the presence of probable cause. Consideration will now be given to suggestion that the warrant issued without probable cause because the questions propounded were not pertinent.

The Court of first instance (page 64 Record) concedes that a witness may

> "rightfully refuse to answer questions relating to matters beyond the bounds of the lawful power of inquiry or when the questions are not pertinent to the matter under inquiry,"

and this for the reason as stated:

> "The Senate does not possess 'a general power of making inquiry into the private affairs of the citizen' nor to compel disclosures relating thereto."

The above rule of law is sustained on the authority of McGrain vs. Daugherty, Marshall vs. Gordon, In re:

Chapman; and particularly, Kilbourn vs. Thompson, since in that case, the relator was dismissed because the questions impinged on his personal affairs.

In Re Pacific R. Commission, 32 Fed. Rep. 241, Mr. Justice Fields at page 253 thus refers to Kilbourn v. Thompson, supra.

> "This case will stand for all times as a bulwark against the invasion of the right of the citizens to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee."

In the Sinclair case just decided by this court the law as above stated was repeated in the forcible language of Mr. Justice Butler, with full reference to sustaining authorities as set forth in the preceding pages of this brief, pages 34 to 48 inclusive.

(a) Legislative Precedents:

The attention of the court should be directed to the cases from Hind's Precedents, wherein the House of Representatives and Senate each respected the rule of the law above announced.

In the following cases, either House of Congress held that the inquiries were of such personal nature as to justify the refusal.

In re: Walcott, Precedent No. 167, the House first committed but afterward receded from its position and finally turned the witness over to the Marshal of the District of Columbia to answer to the presentment for the misdemeanor of contempt then pending in said court; thus showing that the House recognized that a court and jury and not the tribunal which charge the offense is the proper forum before whom the question of pertinency and propriety should be settled on merits.

In re: Williamson, Precedent 1673, the House admitted the impropriety and injustice of asking questions which pertain solely to one's private business affairs, since it discharged one from custody who was willing to answer any proper questions which did not require him to violate his oath or promise, or affect his integrity; but who refused to divulge the private transactions of his business which he was transacting in a perfectly lawful manner.

In re: Covode, Precedent No. 1683, the House abandoned a proposition to arrest a government official who refused to produce a paper which contained a list of certain contributors to a fund which had been raised in New York for use in New York and Pennsylvania in the election of 1856, upon the theory that the information contained in the list had no essential relation to any of the subjects on which the House may legislate. This case is on all fours with the case at bar.

In re: Seward, Precedent No. 1699, The House even when acting as the Grand Inquest of the nation, refused to hold one in contempt for failure to produce his own private books kept for his personal use, even though they contained transactions, both of his private and public affairs.

In re: Turner, Precedent No. 1723, in which the debate in the Senate developed a general sentiment against the practice of demanding the disclosure of private transactions, except where there was good reason to believe that the particular transaction contained material information.

In re: Bank of U. S., Precedent No. 1731, the distinction between the public relations of an institution to the government and its private transactions with individuals, was clearly drawn and enforced.

(b) The Propounded Questions of Disputed Pertinency:

It is not the purpose of respondent in detail to discuss his testimony. This has been done with great care and full references by the learned senior Circuit Judge Buffington in the opinion of the appellate Court (pages 60-70 print).

The attention of this Court should be called to the fact that not one of the four judges who considered this case has sustained the questions as pertinent and particularly that the dissenting opinion of the learned Circuit Judge does not question or advert to the correctness of the conclusion reached in the majority opinion as to non-pertinency of the questions asked. It is deemed sufficient only to advert to the scope of the investigation and to the manner in which the questions by the witness were met.

Resolution 195 of the 69th Congress authorized the appointment of a Special Committee, defined the scope of its inquiry and granted to it powers incidental and necessary to the performance of its duties. (Original 44, Print 34.)

The limit of the authority of the special committee was in its language to "investigate what moneys * * * or things of value * * * have been promised, contributed, made or expended * * * by any person, firm, corporation, or committee, organization to influence the nomination of any person as a candidate * * * for membership in the United States Senate, or to contribute to or promote the election of any person as a member of the United States Senate at the general election to be held in November, 1926". (Original 44, Print 34.)

The resolution then instructs the Committee to "report the names of the persons, firms or corporations, etc., * * * that have made * * * such promises * * * or

payments and the amount of them * * * together with all facts in relation thereto." (Original 44, Print 34.)

The funds of money raised, the names of the contributors and the amounts contributed together with the relevant facts to influence the nomination of any person as a candidate for the United States Senate at the general election to be held in November, 1926, constitute the subject-matter and embrace the scope of the Committee's authority.

The witness denied the jurisdiction of the Committee in the premises, but in the performance of the duty by him owed as a citizen voluntarily appeared and submitted to an examination as to the contributions by him made to the fund raised to promote the candidacy of Wm. S. Vare.

He testified truthfully and concisely to his official positions and the different businesses in which he was interested; to the facts (a) of two contributions, (b) the amount of each (c) the form in which made (d) to whom and (e) when the respective contributions were made; and specifically testified that (f) the contributions were his personal donation and (g) from his personal estate.

He refused to answer any question (a) touching upon his wealth or (b) the source or (c) the manner of its accumulation or (d) out of what part of his personal estate either contribution came, or (e) how long the part contributed had been his property.

The opinion of the Circuit Court of Appeals at great length sets forth the questions which respondent answered, as well as the questions bearing on the inquiry which he answered fully, and also the questions which he did not answer because by him deemed not pertinent. The opinion then states the scope of the inquiry as follows: (Print 68)

> "Turning, then, to the underlying question, was Cunningham in contempt in declining to answer the

questions asked? The answer to that is, Were such questions relevant to the inquiry the Committee was authorized to make? That inquiry, so far as here pertinent, was 'to investigate what moneys * * * have been * * * contributed * * * by any person * * * to influence the nomination of any person as a candidate * * * for membership in the United States Senate at the General Election to be held in November 1926.' Such being the items of inquiry, the resolution provided for a report thereof to the Senate by the committee of such items, viz; 'said committee shall report the names of the persons * * * that have made such * * * payments and the amounts by them severally contributed * * * including the methods of expenditure of said sum * * * together with all facts in relation thereof.' And that the matters so specified constituted the scope of the committee's inquiry was evidenced by the resolution providing for imposing the penalties of Revised Statute 102 upon a witness who 'having appeared refuses to answer any question pertinent to the investigation heretofore authorized'."

The opinion then proceeds with careful analysis to point out that the respondent had given full testimony and complete answer on every possible element of the inquiry and that the questions propounded are not pertinent, saying: (Print, 68, 69)

> "Turning to the inquiry heretofore specified as authorized, we note that Cunningham, as bearing on 'what moneys * * * have been contributed,' testified he had contributed fifty thousand dollars. As bearing on the question whether such money was contributed 'to influence the nomination of any person as a candidate for membership in the United States

Senate,' he testified that he paid the money to Thomas F. Watson, treasurer of a political organization which was supporting Vare for nomination for United (fol. 82) States Senator and Beidleman for Governor; that while he favored and supported Vare as a candidate, his whole object in giving the money was to assist Beidleman, and if Beidleman 'had not been on the ticket I would not have given it.' Touching the subject of investigation described as 'including the method of expenditure of said sums,' Cunningham testified he did not know whether his contribution had been reported in Beidleman's campaign expenses, adding, 'I instructed Mr. Watson what my thought was about it.' It will thus be seen that Cunningham answered the questions asked him on the subjects specified in the resolution and that his answers enabled the committee, so far as the inquiry concerned him, to fulfill the specified duties of their appointment, viz: to 'report the names of the persons * * * that have made * * * payments and the amount by them severally contributed * * * including the method of expenditure of said sums.' Such being the case, we do not see that proof of how Cunningham came by the money he says he thus personally contributed, could affect the objects of investigation referred to by the Senate to the Committee."

It is urged any of the questions which respondent refused to answer, if asked in a court in ordinary litigation, would not have been admitted because irrelevant and immaterial to the issues involved.

The following statement from the opinion of Mr. Justice Holmes, in Federal Trade Commission v. American Tobacco Company, (1923) 264 U. S. 298, is apposite.

"Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe

that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime * * * nothing short of the most explicit language would induce us to attribute to Congress that intent * * * It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."

Moreover it is suggested that the burden of showing pertinency in the instant case rested on the petitioners, and that this burden has not been met.

The following excerpt from the opinion of the Circuit Court of Appeals should here be inserted (page 69 print):

"As we have seen in the proofs the witness had answered, as pertinent to the investigation, that he did not 'collect any money for use in that compaign,' that no money was given him for use in the campaign; that no one asked him to contribute the $50,000. There being nothing in the record to show the relevancy of the question and no ground for relevancy being shown by counsel when interrogated at the argument, the case narrows down to whether the witness was in contempt in refusing to have his private affairs as to where he got this money made a matter of public investigation. The right of agencies of Government to investigate cannot be denied or thwarted, but in statute and decision, we find the line it may not cross is the barrier provided by Statute (R.S. 102) which permits only questions 'pertinent to the question under inquiry,' and as to those without that

limit as lately stated by the Supreme Court in McGrain v. Daugherty, supra, 'a witness rightfully may refuse to answer where—the questions are not pertinent to the matter under inquiry.''

It is further suggested that the witness having given all the information within his knowledge and contemplated under the authority of the Senate, should not be exposed on mere surmise or suspicion to a cross-examination for the purpose of testing his credibility; and that the Committee should indulge the presumption that a witness is telling the truth who voluntarily appears in discharge of his duty as a citizen before a Committee.

The courts heretofore have expressed grave doubt as to the power of a legislative body to compel attendance of a witness and give testimony for the purpose of eliciting information in discharge of a legislative purpose. The witness appears as a citizen obedient to the call of his government, to give information. For this purpose, he is the government's witness, when the information by him is given which covers in full all matters in any way that can be of aid to either branch of Congress, in the formulation of legislation, why should he be exposed to a cross-examination intended only to affect the credibility of the testimony by him given, and especially where it is not said the Senate or House has information to the contrary.

It is not suggested that Congress must be bound by the testimony of the witness, nor that it be precluded from asking any question that may be material or relevant to the legislative inquiry, but only urged the necessity of ending questions that impinge on his personal affairs, when the witness has given all information essential to or within the scope of the legislative inquiry and there is no known fact which impeaches the truth of his testimony.

(2)

NEITHER THE ORIGINAL RESOLUTION 195, NOR ITS SUPPLEMENTAL RESOLUTION 324 OF THE 69TH CONGRESS, NOR SENATE RESOLUTION 10 OF THE 70TH CONGRESS, INSOFAR AS ALL OR ANY RELATE TO THE "NOMINATION" OF A SENATOR, EMBRACED OR CONTEMPLATED A SUBJECT-MATTER VALID FOR THE EXERCISE OF A LEGISLATIVE FUNCTION, SINCE THE SENATE DECLARED VARE WAS NOT A MEMBER.

This proposition requires an examination into the legislative functions of the Senate, which may be defined as (a) defensive, (b) judicial, and (c) law making.

Under the Constitution of the United States, all of these functions are inherent in the powers by it conferred on the Senate.

The inquiry of the power of the Senate under the several resolutions by it passed, resolves itself into a question of the respective functions by it performed under any or all of the said resolutions; and this best may be treated by considering separately and discussing each function with particular reference to the subject-matter of the several resolutions.

(a) *As to the defensive function*:

The Senate, as a legislative assembly, has the right to exist and protect itself against interference with the performance of its duties. Hence, its inherent power to deal with those who in any manner make impossible or impede its functioning under the Constitution as one of the legislative branches of the government.

Mr. Chief Justice White in Marshall vs. Gordon, supra, makes clear that the implied power to commit for contempt "rests solely upon the right of self-preser-

vation to enable the public powers given to be exerted." *He also emphasizes the important fact that the Senate may deal with the offender, either directly itself, or provide for his punishment by the courts of law.*

In adverting to this distinction between the Senate's adjective power to remove impediments to its proper functioning, and to the substantive right to make the act of obstruction a crime, he reviews "the legislative history of the exertion of the implied power to deal with contempt by the Senate;" (page 544) and states that "when viewed comprehensively * * * from the beginning points to the distinction upon which the power rests and sustains the limitations in it which we have stated," as the "least possible power adequate to the end proposed."

The learned Chief Justice then makes the following generalizations from the "principal instances of the legislative contempts by him mentioned in the margin" (page 544):

> "They all, except two or three, deal with either (1) physical obstruction of the legislative body in the discharge of its duties, or (2) physical assault upon its members for action taken or words spoken in the body, or (3) obstruction of its officers in the performance of their official duties, or (4) the prevention of members from attending so that their duties might be performed, or (5) finally, with contumacy in refusing to obey orders or produce documents or give testimony *which there was a right to compel.*" (The numerals are mine for emphasis.)

It is then evident that physical obstruction or assault on a member are, in the large, the only instances which the courts have recognized as proper bases for contempt orders in protection of its defensive function.

(b) *As to the judicial function:*

The contumacy of a witness uniformly has been recognized as cause for contempt when the Senate is exercising a judicial function, e. g., impeachment proceedings or passing upon the qualifications of executive appointees or judging the elections or qualifications of its *members*. The reason for this is evident, because not only in analogy to a court's power but essential to the exercise of one of its proper functions.

A review of the cases, wherein the power to commit for contempt has been exercised in performance of the judicial function, warrants the following conclusions:

1. A legislative assembly, when judging of the elections and qualifications of members, exercises a judicial function; and

2. Contempt proceedings have in every instance been premitted only where the investigation involves members to whom the oath of office has been administered and who have qualified as such.

In reason, and under the express provisions of the Constitution of the United States, and under the decisions of this Court construing the power, the Senate of the United States can not commit for a contempt by an individual in an investigation involving either the election or qualifications of an individual certified as elected, but who in fact, by its own resolution, is not a member of the Senate.

Paragraph 1, of Section 5, Article I of the Constitution of the United States provides:

> "Each House shall be the judge of the elections, returns and qualifications of its own *members*. * * *"

Paragraph 2 of the same section and article provides:

> "Each House may * * * with the concurrence of two-thirds expel a member."

The Senate of the United States, when it "judges" of the *elections* and *qualifications* of its own members, sits in truth, as a court, and as such, passes upon the most delicate and vital questions that can claim the attention of the human mind in its search for the principles of stability and order in government and of justice among men.

One who presents credentials which bear the seal of a sovereign state and the signature of its executive, is not only an individual proud in the realization of ambition achieved, but is the "*ambassador*" of a state (Burton vs. U. S. 1905, 202 U. S. 344) charged with the duty to its citizens to maintain the structure of government as ordained by the Federal Constitution; and to protect and conserve the rights of the states which the people therein have reserved to themselves.

The privilege of an individual, the rights of a state as guaranteed by the constitution and reserved to the people, the integrity of the continuous relation between the state and federal government, and the permanence of the framework of constitutional government, may arise when the Senate passes judgment upon the elections or qualifications of its members; and in our judgment, have arisen and flow from the manner in which the Senate of the United States has and is now judging the election and qualification of the bearer of credentials of a senator from the Commonwealth of Pennsylvania, and in which proceeding, the relator, Thomas W. Cunningham, has been adjudged in contempt.

The Senate of the United States by resolution 2, has finally, for the purposes of this case, decided that:

> "until * * * the report of said committee and * * * final action of the Senate thereon the said William S. Vare, and he is hereby, denied a seat in the United States Senate." (Original 52, Rec. 41.)

That he is not a member of the Senate is also made clear by the proviso of that resolution, which accorded him "the privileges of the floor * * * for the purpose of being heard touching his right to * * * oath office and * * * membership in the Senate."

That Congress generally has acted on the necessity for the formal administering of the oath as a constitutional condition to membership is made clear by the fact that an Act of Congress was necessary to provide for payment to the members-elect between the 4th of March preceding the first Monday of December, which the Constitution fixed as the beginning of Congress to which they were elected. (See Act of March 3, 1883, 22 Stat. 632.)

The Senate can perform its judicial function only if and when the election of a *member* is in question; or the age, residence, or citizenship of a *member*, or his conduct, or character raise the issue of his qualification; and it is obvious that if effect is to be given to the Constitution, when a governor of a state legally has certified to the election of a senator, that *membership* in the Senate is essential to its pasisng on the fact of "either his election or qualification;" that the nomination of a senator at a primary or convention is distinct from his final election; and that the formality of the oath is necessary to *membership* in the Senate.

Keeping in mind the foregoing fundamental principles, the following dates are important:

On May 18, 1926, the Pennsylvania primary was held; and on May 19, 1926, Senate Resolution 195 was passed and the Special Committee appointed.

On July 29, 1926, Cunningham testified before the Committee at Chicago.

It will be observed that at this stage of the proceedings, the Special Committee was authorized and empowered to inquire alone into the *nomination* of senators. The general election had not taken place, and the scope of the inquiry necessarily was limited to an inquiry into the primaries at which Vare was nominated.

Now, it is submitted that there was under the Constitution and under the decision of the Supreme Court of the United States in the Newberry case (1920) 256 U. S., 232, hereinafter more particularly to be discussed, no authority and no power to investigate the *nomination* of Vare; and this because it was without authority to formulate legislation affecting nominations at primaries or convention; and the general election not having taken place, no question of his election could arise.

On November 2, 1926, the general election was held, and on January 8, 1927, William B. Wilson, filed his contest against Vare.

On January 10, 1927, Governor Pinchot filed a certificate, wherein he stated that:

> "On the face of the returns filed * * * William S. Vare appears to have been chosen by the qualified electors of the State of Pennsylvania, a senator from said state."

On January 11, 1927, Senate Resolution 324 was passed. This resolution recites the contest filed by Wilson, refers to the Special Committee appointed and functioning under Resolution 195 and resolves that the Committee be vested

> "with all powers of procedure with respect to the subject-matter of this resolution that * * * said committee possesses under resolution 195 * * * with respect to the subject-matter of that resolution."

On February 21, 1927, Cunningham again appeared before the Special Committee at Washington.

In this discussion of the infirmity of the Senate's power to investigate either the nomination or election of Vare, no reference has been made to the nature of the questions asked of the witness Cunningham; but when it is stated that every question asked related to contributions to the fund raised for the purpose of advancing the candidacy of Vare at the primaries, and that no question at either the first or second hearing, was asked of the witness relating to the general election; there is presented the most persuasive and convincing reason why the Senate was and is without power to commit Cunningham for contempt.

It is then submitted that when Thomas W. Cunningham appeared before the Committee for the second time on February 21, 1927, the Senate was without power to investigate either the nomination or the election; and that since the questions asked Cunningham related alone to the nomination, Cunningham could not be guilty of contempt, even though the Committee had power to investigate as to the election.

This discussion of the action of the Senate in the 69th Congress, should close with the following facts:

On February 24, 1927, Senate Resolution 364, to extend the life of the Special Committee, was introduced. The significance of this resolution and its phraseology are conclusive of the conviction that the Senate felt that the resolution was essential and necessary to give vitality to the Special Committee, after the ending of the 69th Congress. This resolution failed of passage and the Committee ended with the expiration of the 69th Congress.

On February 28, 1927, the Special Committee made a report setting forth the testimony of the witness Cunningham and recommending his punishment for contempt. This resolution reads as follows:

> "Your committee therefore reports the defiant and contumacious conduct of the said witness, Thomas W. Cunningham, and recommends that he be adjudged in contempt of your committee and of the Senate of the United States."

This recommendation, like the resolution extending the life of the Special Committee functioning under Resolution 195, failed to meet with any final action by the Senate.

The conclusion then is reasonable that so far as the judgment of the 69th Congress is involved or concerned, its decision was that Thomas W. Cunningham

was not guilty of contempt and should not be so adjudged by the Senate.

On March 3, 1927, Vare's credentials by Governor Fisher were presented in a certificate which stated in the language of the law:

> "On the 2d day of November, 1926, William S. Vare was duly chosen by the qualified electors of the State of Pennsylvania a Senator from said State to represent said State in the Senate of the United States for the term of six years, beginning on the 4th day of March, 1927."

On March 4th, 1927, the 69th Congress adjourned, and with the adjournment of that Congress, ended all power of the Senate to commit Cunningham for any contempt committed during that Congress.

We now come to the opening of the 70th Congress and it is this Congress alone that had power to act either on the nomination or election, or in any way to judge of the qualifications of Vare; and this because he was legally certified as elected as a member to this Congress and not to any other Congress.

Legislative bodies, on many occasions, have refused to administer the oath of office to a member-elect, pending an examination into the legality of their credentials.

A careful study of the precedents discloses seventeen cases where credentials were referred by the Senate to a committee before the oath was administered; but in every one of the cases, the credentials disclosed affirmatively some infirmity on their face; or a question arose as to the qualifications of the senator-elect as defined in Section 3 of Article I of the Constitution of the United States as to age, citizenship, residence and inhabitancy, as an examination of the list of such cases attached to this brief will disclose. (Exhibit "A".)

It should also be pointed out that in thirty-four cases, the Senate administered the oath and then referred the credentials to a committee for subsequent action, as a list hereunto annexed, will disclose. (Exhibit "B".)

This significant fact should also be called to the court's attention: That in every instance, except three, where the credentials were referred before the oath was administered, the contest arose out of, and was included within the reconstruction period following the Civil War, when the animosities and bitterness engendered by the great struggle involving slavery inflamed men's passions and warped their judgment. One of the three cases re-

lated to the mental competency of Niles; in another, the illegality of DuPont's election appeared on the face of the returns; and in the Nye case, a legal question was presented.

It is suggested that the Senate will search in vain for a precedent *where a senator-elect has presented credentials in legal form, evidencing his election and possesses the constitutional qualifications, who has been denied membership.*

The Senate, however, by formal resolution decided that he is not a member, and he is to-day treated by sufference as an individual, with right alone to present his credentials and the cause of his state to its bar.

It is submitted that when the Senate declared that William S. Vare was not a member of that body, it, by that formal act, deprived itself of power to pass on his constitutional qualifications, or to investigate either his election or inquire into his nomination; and that when it forfeited its power so to function in a judicial capacity, it was without authority or jurisdiction to commit respondent for contempt.

The argument here advanced does not question power of the Senate to pass upon, or judge the qualifications of a member of the Senate, *after* he has been sworn in, from any point of view, whether legal, moral or esthetic. It may be sound to conclude that the Senate has the power, in the exercise of judicial function, to judge a member who has taken the oath to be unworthy of membership, and by a majority vote, vacate his office, or by a two-thirds vote expel him for any cause that may be pleasing to its conception of a senator's qualifications.

The qualifications as to age, citizenship, residence and inhabitancy, as set forth in Section 3 of Article I of the Constitution, are the only qualifications which can or may determine his right to be qualified as a senator under the legal certificate of the governor of the state whose accredited representative he is; and this because the words of the Constitution confers power to judge of the qualifications of *members* only.

If the Senate has power to pass upon the non or extra constitutional qualifications of a senator-elect and before he becomes a member, then any qualification pleasing to the Senate as then constituted, is added to the qualifications named in the Constitution; and the latter, by arbitrary act of the Senate, is in fact amended.

It was the protest against this unconstitutional amending of the un-written constitution of England, by the arbitrary act of the House of Commons which excluded Wilkes (John Wilkes, Journals of the House of Commons

1769, Vol. XXXII, p. 228) in obedience to the will of George the Third, that arrayed Grenville, Burke and Pitt, on the side of the convicted and outcast Wilkes, shook the privileges of the Crown and aroused the people of England to the defense of representative government under the constitution.

The vital issue involved in the Wilkes case was not so much the right of the people of Middlesex to choose their representative, but rather the power of the House of Commons, because of pressure of the King, arbitrarily to deny membership to one qualified under the constitution.

It was at the time of Wilkes' election a part of the unwritten constitution of England that "a *member* may be expelled from the House of Commons for any cause which renders him unfit to serve." See Mays Parliament Pract. 11th Ed., pages 56 and 58).

> "But unless the *cause of his expulsion* constitutes in itself a disqualification under the constitution, it is open to his constituency to re-elect him, and if elected, must be seated as a member."

See Laws of England, Earl of Halsbury, Vol. 21, page 787 and the speech of George Grenville in the Wilkes case.

Wilkes was expelled for offenses which did not, in themselves constitute a disqualification under the constitution, e. g., conviction for libel and outlawry. He was elected to a succeeding Parliament, which in disregard of the Constitution, against the objection of Blackstone and the splendid constitutional argument of the courageous Grenville, at the King's insistance, expelled him because guilty of "an insolent scandalous libel," being the same reason on which his expulsion from a previous Parliament was based.

Again, he appeared before the people of Middlesex; again he was elected; for the people were so aroused that no candidate opposed him.

Then was done in that case as in the case of Vare; for even before his credentials were presented, immediately upon his election being announced, the House of Commons resolved that "Wilkes was incapable of being elected a member to serve in the present Parliament."

Again, the House of Commons violated the Constitution of England, by substituting its qualifications instead and in violation of the Constitution.

Again, Wilkes went to the people and for the fourth time he was elected and again he was denied his seat. But the people of England were aroused to such an extent that the Crown party finally ceased its assault on the Constitution; Wilkes was seated and Parliament, by resolution, expunged the most objectionable of all its resolutions against Wilkes, wherein it attempted to declare a member-elect "incapable of being elected," before he had been sworn in as a member.

The great argument of Grenville refers to and discusses many precedents in support of the provisions of the Constitution, which the House of Commons had violated; and closes with these memorable words:

> "*They are to mingle up new crimes with old, and to try a man twice by the same judicature for the same offence. They are to transfer the censures of a former parliament, contrary to all precedent, and to make them the foundation of the proceedings of a subsequent one. They are to assume a power to determine upon the rights of the people, and of their representatives, by no other rule, but that of their own inclination or discretion; and, lastly, they are to attempt to persuade mankind, that they do all these things to vindicate their own honour, to express their respect for their King, and their zeal for the sacred names of their God, and their Religion.*"

The elder Pitt, in the House of Lords, stressed the blow which this case gave to the British Constitution:

> "A breach has been made in the Constitution, the battlements are dismantled, the citadel is open to the first invader, the walls totter, the constitution is not tenable. What remains then but to stand foremost in the breach or parish in it?"

In Goodrich's "British Eloquence," the following reference is made to an incident which took place at the conclution of Lord Chatham's speech:

At the conclusion of the speech, Lord Camden, who was still Lord Chancellor, came down from the woolsack and broke forth in the following indignant terms:

> "I accepted the great seal without conditions; I meant not, therefore, to be trammeled by his Majesty—I beg pardon, by his ministers—but I have suffered myself to be so too long. * * * I have often dropped and hung down my head in council and disproved by my looks those steps which my avowed opposition could not prevent. I will do so no longer, but openly and boldly speak my sentiments. I now proclaim to the world that I entirely coincide in the opinion expressed by my noble friend—whose presence again reanimates us—respecting this unconstitutional vote of the House of Commons."

That bold utterance cost the Lord Chancellor his office. Lord Campbell in his "Lives of the Chancellors," says:

> "All mankind are agreed that the House of Commons acted illegally and unconstitutional in expelling Mr. Wilkes for a supposed offense committed before his re-election and in seating Mr. Luttrell as representative for Middlesex."

In the Vare case, at the opening of the 70th Congress, the Senate had the legal and proper certificate of the Governor of Pennsylvania, which certified to Vare's election. He was qualified under the Constitution, as to age, citizenship and inhabitancy. The Senate "denied (him) a seat in the United States Senate," because of "the expenditure of * * * a large sum of money * * * to secure the nomination," as disclosed in the report of the Special Committee appointed by the Congress to which he was not elected, to investigate the "nomination" of senators to be elected.

The following excerpt from the opinion of Mr. Justice Pitney in the case of Newberry vs. U. S. (1920) 256 U. S., 232, should now be called to mind (page 285):

> "The power to judge of the elections and qualifications of its members, inhering in each House by virtue of S. 5 of Art. 1, is an important power, essential in our system to the proper organization of an elective body of representatives. But it is a power to *judge*, to determine upon reasonable consideration of pertinent matters of fact according to established principles and rules of law; not to pass an arbitrary edict of exclusion. *And I am unable to see how, in right reason, it can be held that one of the Houses of Congress, in the just exercise of its power, may exclude an elected member for securing by bribery his nomination at the primary, if the regulation by law of his conduct at the primary is beyond the constitutional power of Congress itself.*"

Petitioners say that relator's contention that Article I, Section 5 restricts the Senate to judge of the qualifications of "its own members" who have been sworn and qualified as such, "is a play upon words."

Respondent but calls attention to plain English words which express a fundamental fact in the Federal Constitu-

tion. ***It is only by giving these words their clear meaning that the vital continuous relation between the State and Federal Government can be maintained.***

The creation of the Senate as a branch of Congress representative of the states, was a concession to the states, which in the opinion of profound thinkers made possible the Constitution, itself. The branch of legislature thus created, the States provided for its perpetuation by three things: First, defining the qualifications of senators in the negative form as to age, citizenship and inhabitancy (Section 3, Article I); Second, by Sections 4 and 5 of the Art. I, which insured continuous representation after the State had elected a senator possessing the qualifications as thus defined in the Constitution; and Third, by the proviso in Article V which inhibits the Federal Government from depriving any state "of its equal suffrage in the Senate."

If the Senate has the power to ignore the legal certificate of election of the Governor of a state and deny membership to one who possesses the qualifications as defined in the Constitution, the three safeguards for continuous and perpetual representation in the Senate will have been stricken down; qualifications not defined in the Constitution, the Senate by its act will have written into the Constitution; and the state thereby will have been deprived of its equal suffrage in the Senate for the length of time, at least, intervening between the vote denying him membership and the determination of the issue of the election or his qualifications.

It is not pertinent that a subsequent decision that he is unfit is virtually an expulsion; for the seat may be declared vacant by the same majority vote that denied him membership. It is all a question of degree of culpability on the part of the member who is declared unworthy of membership or not entitled to sit as a member.

In its final analysis, it is submitted that effect must be given to the simple words and clear meaning of the Consti-

tution, if the thing most vital to the relation between the State and Federal Government is to be preserved.

As to giving the plain and obvious meaning to the words of the Constitution, reference is made to the remarks of Mr. Chief Justice Taney in Passenger Cases (1849) 7 Howard, 478:

> "The members of the convention unquestionably used the words they inserted in the constitution in the same sense in which they used them in their debates. It is their object to be understood, and not to mislead, and they ought not to be supposed to have used familiar words in a new or unusual sense. And there is no reason to suppose that they did not use the word 'imports,' when they inserted it in the constitution, in the sense in which it had been familiarly used for ages, and in which it was daily used by themselves. If in this Court, we are at liberty to give old words new meanings when we find them in the constitution, there is no power which may not, by this mode of construction, be conferred on the general government, and denied to the state."

The Senate cannot judge of the qualifications of one whom it has declared not to be a member. It must give force and effect to the certificate of election of one who by age, citizenship and inhabitancy is qualified under the Constitution.

The Special Committee of the 69th Congress could not judge of the qualifications of Vare; nor could the 70th Congress pass upon his qualifications until the oath of membership had been administered to him.

Respondent seeks to escape the force of the argument involving the vital and fundamental relation above adverted to, as set forth in the above excerpts from the Constitution, by the argument of verbal criticism, and the statement that:

> "The practical construction placed upon the word 'Member' by legislation is * * * opposed to relator's view;"

and reference is made to Section 201, Chapter 7 of the Revised Statutes 105 relating to contemplated contested election of members.

This Act, of course, uses the word "member" just as the Act relating to the payment of salary to members after their election and before their being sworn in as members; and this for two reasons: First, because necessary in the one instance to enable the member-elect to receive his salary and in the other to permit the contest to be filed before his qualifying as a member under the Constitution by administration of the oath. Second, after governor has certified to the return, in the theory of the Constitution, any man so returned who has the constitutional qualifications is a member, lacking only the formality of the oath to make him legally such.

In the instant case, it is the arbitrary act of the Senate which by formal resolution, has declared that the Senator from Pennsylvania is not a member that differentiates between the legal consequence of the return as elected of a member and the denial of the fact of membership.

Both the Senate and House of Representatives have deemed it necessary to pass appropriate legislation in order to give to members-elect their respective salaries and to contestants certain privileges during the interim of the election and their legally qualifying as *members*; which but furnishes additional considerations in support of the conclusion that a member-elect is to be differentiated from a member and becomes the latter only upon the administration of the oath.

But the Senate in the Vare case has, by its own act, determined that Vare is not a member; and hence, the controlling consideration here is not so much a constitutional

interpretation as it is the bald fact that Vare is not a member of the Senate as its formal resolution declares.

In the court below, counsel for appellee answered appellant's constitutional position that the Senate in judging of the qualifications of its members is limited to passing upon the certificate of election of the governor of a state, to the enforcement of the prohibitions contained in the Constitution as to age, citizenship and inhabitancy, as follows:

> "The argument that the Senate must accept a lunatic or felon if his credentials are regular on their face—need not detain us long."

The force of this statement is lost in the knowledge that Article XVII of the Amendments to the Constitution, in analogy to the qualifications of voters for members of the House of Representatives, provides that:

> "The *electors* in each state shall have the qualifications requisite for *electors* of the most numerous branch of the state legislatures."

It should require the citation of no precedents to establish the fact that lunatics, or the mentally incompetent under the common political law, both of England and the United States, are excluded from exercising the right of suffrage as electors; and in the constitutions, or by statutes of the states, it is universally provided that the insane are not qualified electors.

See particularly:

> In re: Contested Elections 1 Brewster (Pa.) 162;
> Thompson vs. Ewing, 1 Brewster (Pa.) 67;
> Sinks vs. Reese, 19 Ohio St. 306.

Convictions of certain felonies, e. g. polygamy as in the cases of Carmon and Roberts and accepting legal fees in the Whittemore case (the only three precedents cited in

Petitioners' Brief, pages 24-25) likewise, disqualify; but it is suggested that if it should so happen that a United States Senator should be convicted of an offense, which did not disqualify him as an elector, and he should present a legal certificate of election from the Governor of his state, the Senate, under the Constitution, should administer the oath, non constat forthwith, it could expel or declare his seat vacant.

Petitioners now take the bold position that the Senate in effect may amend Article 1, Section 3, Clause 3, of the Constitution, by adding to the negative qualifications therein set forth such disqualifications as may be pleasing to its will. (Brief for Petitioners, pages 23 and 24.)

The only reason given in support of this astounding proposition, is that the affirmative statement of qualifications is "a distortion of the plain language of the Constitution", and also because "the provisions in the Constitution are not qualifications but disqualifications".

It is respectfully submitted that petitioners' construction of the plain words of the Constitution violates the maxim, *expressio unius est exclusio alterius*, and that either the affirmative or negative expression of some qualifications either of an elector or of an officer in a constitution necessarily involves the exclusion of others whether called qualifications or disqualifications. See Vol. 6 Ruling Case Law, sec. 43, pg. 49 and 12 Corpus Juris, sec. 52, pg. 707.

This court in Brown vs. Maryland (1827) 12 Wheaton 419, in an opinion by Mr. Chief Justice Marshall, applied the above maxim of construction to the United States Constitution, wherein the negative language following was construed:

> "No State shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The learned Chief Justice on page 438 says:

"The exception was made, because the tax would otherwise have been within the prohibition. If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause, had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution as to other instruments."

In Ex Parte Vallandigham (1863) 1 Wallace, 243, in passing upon the appellate power of this court as set forth in the affirmative said on page 252:

"The rule of construction of the Constitution being, that affirmative words in the Constitution, declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases."

In the Pennsylvania case of Page v. Allen (1868) 58 Pa. 338, the very question here presented was decided so far as the same relates to the qualifications of *electors* as defined in the Pennsylvania Constitution.

In that case it was expressly held that

"No constitutional qualification of a voter can be abridged, added to or altered by legislation."

Mr. Chief Justice Thompson in that case said on page 346:

"So in regard to qualification for office. An act which should require a resident in the state for ten years, instead of three, or an age of fifty years, or freehold estate, in order to be eligible to the office of representative, would be void for repugnancy, because dif-

fering from the qualification expressed in the constitution, and would be so only by necessary implication; necessary to keep legislation within the paramount rules of the constitution. The expression of one thing in the constitution, is necessarily the exclusion of things not expressed. This I regard as especially true of constitutional provisions, declaratory in their nature. The remark of Lord Bacon, 'that, as exceptions strengthens the force of a general law, so enumeration weakens, as to things not enumerated,' expresses a principle of common law applicable to the constitution, which is always to be understood in its plain, untechnical sense: Commonwealth v. Clark, 7 W. & S. 127."

And further on page 347 he said:

"As a corrollary of this, no constitutional qualification of an elector can in the least be abridged, added to, or altered, by legislation or the pretense of legislation. Any such action would necessarily be absolutely void and of no effect."

In reason and on authority, it should be concluded that he who has the qualifications of an elector to the most numerous branch of the state legislature and who is not barred by any of the constitutional prohibitions as to qualifications, is qualified to become a member and being legally so certified must be sworn in as such; and conversely, he who has not the qualifications of such elector, or is barred by any of the constitutional qualifications, or whose certificate is not in legal form, is not qualified to become a member and the oath may be denied him.

It is then submitted that the Senate was not acting in a judicial capacity when in the 69th Congress, it made inquiry as to the elections and qualifications of the individual certified as a senator from Pennsylvania, and the relator refused to answer the same; nor can it act in a judicial

capacity in the 70th Congress, nor make inquiry as to the qualifications of one to whom it has denied membership, although legally certified as elected; and that consequently, it did not and can not perform judicial function in asking relator questions growing out of the primaries or election of William S. Vare.

(c) *As to the law making function.*

Mr. Justice Miller in the case of Kilbourn v. Thompson (Supra) states that the Supreme Court does not concede "that the House of Congress possess this general power of punishing for contempt." Indeed, that question was by the Supreme Court reserved in the following language by Mr. Justice Miller, (page 189):

> "Nor, taking what has fallen from the English judges, and especially the later cases on which we have just commented, is much aid given to the doctrine, that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation.
>
> This latter proposition is one which we do not propose to decide in the present case, because we are able to decide it without passing upon the existence or non-existence of such a power in aid of the legislative function."

The question thus reserved never reached the Supreme Court for final decision until 1927. In the case of McGrain v. Daugherty (Supra) it was said:

> "That the object of the investigation and of the effort to secure the witnesses' testimony was to obtain information for legislative purposes."

This implied power, Mr. Justice Van Devanter qualifies and limits, however, with the following statement, so es-

sential to the protection of the rights of the individual against unlawful or unauthorized investigations:

> "Neither House is invested with general power to inquire into private affairs and compel disclosures but only such limited power of inquiry as is shown to exist when the rule of constitutional interpretation is rightly applied."

In the Sinclair case this Court has just announced the rule in the language quoted on page 34 of this brief.

(3)

THE SCOPE OF THE SPECIAL COMMITTEE FUNCTIONING UNDER RESOLUTION 195 EMBRACES A SUBJECT MATTER, UNDER THE AUTHORITY OF NEWBERRY v. UNITED STATES (1920) 256 U. S. 232, AS TO WHICH THERE CAN BE NO VALID LEGISLATION AND THIS BECAUSE IT RELATES TO NOMINATIONS OF SENATORS AT PRIMARIES.

In this case Senator Newberry was convicted of violating the several Acts of Congress which may be designated as the "Corrupt Practices Acts." These statutes provided in substance that no candidate for Congressman or Senator shall contribute for his *nomination* and election an amount in excess of that allowed under the laws of his State, and in no event in excess of $10,000.00.

The indictment charged contributions in excess of the allowed sum for his nomination and election. The court below overruled a demurrer as to the unconstitutionality of the statutes.

This Court in an opinion by Mr. Justice McReynolds, concurred in by a majority of the Justices, held that the Acts were unconstitutional because as by him stated on page 258:

> "We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the state, and infringe upon liberties reserved to the people."

This was based on the conclusion as expressed in the syllabus as follows:

> "The only source of power which Congress (prior to the adoption of the 17th Amendment) possessed over elections for Senators and Representatives was U. S. Const., article 1, par. 4, which empowers Congress to regulate the manner of holding such elections."

In the view of Justice McReynolds the construction of this clause of the Constitution, as by him expressed on page 247, is "the ultimate question for solution."

The learned Justice refers to the fact that all of the Acts of Congress were enacted prior to the 17th Amendment to the Constitution; but expresses the opinion that this Amendment (page 252):

> "As finally submitted and adopted • • • does not undertake to modify Article 1, Section 4, the source of Congressional power to regulate the times, places, and manner of holding elections. That section remains 'intact and applicable both to the election of Representatives and Senators.' "

Mr. Chief Justice White and Mr. Justice Pitney wrote dissenting opinions, the latter concurred in by Justices Brandeis and Clark, wherein they conclude that Congress had the power to legislate as to primaries, since an essential part of the election.

Mr. Justice McKenna concurred in the opinion of the majority but "reserves the question of the power of Congress under the Amendment."

In Chandler v. Neff, 1924, 298 Fed. 515-519, Texas passed a law excluding negroes from the right to vote in primary elections. The question was whether this violated the Fourteenth and Fifteenth Amendments. It was held that it did not because Congress had no right under the Constitution to regulate a primary.

District Judge West says, (page 519):

"Any reasonable test of party affiliation may be required by the Legislature. Many cases are cited in support of this principle. A reference to the Digests, Corpus Juris and Cyc. gives numbers of citations in support of the point. In direct line with these authorities is the case of Koy v. Schneider, 110 Texas, 369, 218 S. W. 479, 221 S. W. 880, also Waples v. Marrast, 108 Tex. 5 184 S. W. 180, L. R. A. 1917 A 253.

"The balancing of authorities and the weight of authority if in doubt is settled by the Supreme Court of the United States in Newberry v. United States, 256 U. S. 232, 41 Sup. Ct. 469, 65 L. Ed. 913. It was there held that primary elections 'are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors'. It therefore may be considered as determined that the State of Texas was within its powers in providing its tests of qualification of Democratic electors, and in providing by its articles that negroes were not permitted to vote in a Democratic primary election it was within the due exercise of its police powers which were reserved to it."

In Nixon vs. Herndon (1926) 273 U. S. 536, this primary law was stricken down by this Court because it deprived negroes of the equal protection of the laws.

In United States v. Cameron, 1922, 282 Fed. 684, District Judge Van Fleet says:

"We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair

intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the state and infringe upon liberties reserved to the people."

The following excerpt from the opinion of Mr. Justice Clark, in the case of United States v. Gradwell, 243 U. S. 476, in this connection should be given, (page 487):

"The constitutional warrant under which regulations relating to congressional elections may be provided by Congress is in terms applicable to the 'times, places, and manner of holding elections (not nominating primaries) for Senators and Representatives.' Primary elections, such as it is claimed the defendants corrupted, were not only unknown when the Constitution was adopted but they were equally unknown for many years after the law, now #19, was first enacted. They are a development of comparatively recent years, designed to take the place of the nominating caucus or convention, as these existed before the change, and even yet the new system must be considered in an experimental stage of development under a variety of state laws."

It is then evident that at the time of the passage of the Resolution 195 Congress was without power to enact legislation, regulatory of the nominations of Senators. It must then follow as a necessary conclusion that being without legislative power to enact such laws, the Senate was without power to investigate facts relating to *nominations* of Senators preparatory to and for the sole purpose of formulating such legislation.

It is submitted that the power which deprives the Senate of the United States to legislate respecting primary elections, likewise deprives it of investigating them.

It should be further called to the attention of the Court that both the Senate and House of Representatives prior to the passing of Resolution 195 have acquiesced in and directly recognized the Constitutional inhibition which the Newberry case places on their power to enact legislation either regulatory of or relating to NOMINATIONS for either branch of Congress.

While Senators may disagree with the law as announced in the Newberry case; yet no Act of Congress affecting nominations has been enacted since that decision; and the only statute passed subsequent to it in an effort, as by Mr. Justice Reynolds therein suggested "To protect * * * against corruption, fraud or other malign influences" in elections is the statute approved February 28th, 1925, (43 Statutes at Large 1071).

This act provides for publicity or campaign contributions and in express terms relates to "Elections only; in a contradistinction to nominations. An election as therein defined does not include *'either a primary election or a Convention of a political party.'* "

It is then finally submitted that the Senate being without constitutional power to legislate relative to the nominations of Senators by primary election or convention, is without authority to empower a special committee to make investigations into the nominations for the purpose of such legislation.

(4)

THE SPECIAL COMMITTEE APPOINTED UNDER RESOLUTIONS 195 and 324 EXPIRED AT THE CONCLUSION OF THE 69th CONGRESS; AND THAT COMMITTEE HAVING REPORTED TO THE SENATE THE ALLEGED "CONTUMACIOUS CONDUCT OF * * * CUNNINGHAM," AND HAVING RECOMMENDED THAT "HE BE ADJUDGED IN CONTEMPT," AND THE SENATE HAVING TAKEN NO ACTION IN THE 69th CONGRESS UPON THE RECOMMENDATION, IS WITHOUT POWER IN THE 70th CONGRESS TO PUNISH FOR A CONTEMPT BY THE SENATE ADMITTED TO HAVE BEEN COMMITTED IN THE PRECEDING CONGRESS.

No extended argument will here be indulged in support of the proposition that the Special Committee died with the expiration of the 69th Congress and this because the Senate by Resolution 10, passed in the 70th Congress, revived it, in accordance with the opinion of Mr. Justice Van Devanter in McGrain v. Daugherty (Supra).

The Senate has tacitly admitted that the Special Committee would die with the 69th Congress unless some action were taken to revive or continue it on two specific occasions. First, when at the expiration of the 69th Congress it attempted to continue its existence in the 69th Congress by Resolution 324 which failed of passage; and second, when it passed in the 70th Congress Resolution 10 for its revival.

It is suggested that the recitals of the Resolution, relative to continuance of the Committee during the interim of the adjournment of the 69th Congress and the actual revival of the Committee in the 70th Congress, and to ratify and confirm its actions during such period, while probably necessary to give validity to its acts during the interim, cannot affect or change the fact of its death.

The essential thing in connection with the contempt proceeding against Cunningham is:

First, that the Congress in which the alleged contempt was committed, expired without taking any action on the recommendation of the Committee that he be adjudged in contempt, and the power to punish ceased with its dissolution under the Constitution; and

Second, that no contempt was committed by Cunningham in the 70th Congress for he was neither summoned as a witness nor asked a question by the revived Special Committee after that Congress convened, and this although the Senate is in theory a continuing body.

The Constitution provides for distinct Congresses of fixed beginning and ending. The members of the Senate in successive Congresses are entirely different, the terms of one-third ending with the expiration of each Congress and being in theory successors. If a succeeding Congress may punish for a contempt committed in a preceding Congress, a different tribunal unfamiliar with the facts or circumstances in effect will render a judicial judgment on the existence or non-existence of the contempt. Likewise, the contempt exists perpetually; for if a succeeding Congress may punish for an offense committed in the immediately preceding Congress, what limitation is there to the number of intervening succeeding Congresses that may imprison for contempt?

The theory of the continual and perpetual nature of contempt is abhorrent to the sense of justice, since it imprisons the individual without trial by peers and by tribunal constantly changing in personnel and acting without the restraints and within the limitations which the laws of the land impose on the Courts.

(5)

THE REVIVAL OF THE SPECIAL COMMITTEE BY RESOLUTION *10* OF THE 70TH CONGRESS CONFERS NO AUTHORITY TO COMMIT CUNNINGHAM FOR A CONTEMPT BY THE SENATE ADMITTED TO HAVE BEEN COMMITTED IN THE 69TH CONGRESS; AND THIS BECAUSE THERE CAN BE NO IMPRISONMENT FOR A CONTEMPT BEYOND THE CONGRESS IN WHICH IT WAS COMMITTED.

Mr. Chief Justice White in Marshall V. Gordon (Supra) at page 542, points out the fundamental principle that

> "from the very nature of that power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preserv ation; that is, the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed. And the essential nature of the power also makes clear the cogency and application of the two limitations which were expressly pointed out in Anderson v. Dunn, supra; that is, that the power, even when applied to subjects which justified its exercise, is limited to imprisonment, and such imprisonment may not be extended beyond the session of the body in which the contempt occurred. Not only the adjudged cases, but congressional action in enacting legislation as well as in exerting the implied power, conclusively sustain the views just stated."

In Volume 26 Ruling Case Law, Section 15, page 1425, the rule is stated as follows:

> "The limit, however, of the power to imprison in all such cases is for a term not exceeding the session of the body in which such contempt concurred."

The rule as to the power of legislative assembly to imprison only for the session in which the contempt is committed as announced in Marshall v. Gordon (supra) follows the English rule, that the prorogation of Parliament discharges all persons imprisoned by either the House of Lords or the House of Commons (see Halsbury's Laws of England, Vol. 21, pages 790 and 791).

On the authority of Anderson v. Dunn (supra) the rule is also stated in Volume 39 Cyc. (page 709), as follows:

> "This power to punish for contempt * * * extends to the imprisonment of the party for a period *not* beyond the adjournment of periodical dissolution of such legislative body."

In Anderson v. Dunn (supra) Mr. Justice Johnson says on page 230:

> "And even to the duration of imprisonment a period is imposed, by the nature of things since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with the adjournment."

Reference should be made to Sections 102, 103 and 104 and Section 859 of the Revised Statutes of the United States, Barnes Fed. Code 114, et seq., (Exhibit "C") which makes the refusal of a witness to appear or testify a misdemeanor punishable by fine and imprisonment.

The imprisonment may not be "for not less than one month nor more than twelve months."

This limitation on the time of the imprisonment is significant in that it is a statutory declaration in accord with the law as announced in England and in America as hereinbefore shown that the imprisonment for contempt can not exceed the Congress in which committed.

In this connection reference should be made to McGrain v. Daugherty (Supra) wherein it was held as stated in the syllabus that

> "the expiration of a term of Congress at which a Senate Committee * * * was created does not render moot a question as to the power of the Senate to compel the attendance of witnesses."

It is evident that the question there decided is different from the proposition here suggested for no question there arose as to the power of a subsequent Congress to punish a contempt committed in a previous Congress, since the resolution of contempt was passed at the same session of Congress during which the witness refused to appear and testify before the Committee.

The Committee's activities, in the language of Mr. Justice Van Devanter, page 384, "apparently * * * have been suspended pending the decision of this case," it was of course held that "the case cannot be said to have become moot;" since the "senate being a continuing body," "The committee may be continued or revived now by motion to that effect," with "all its original powers." The differentiating fact is that in McGrain v. Daugherty the commitment properly took place in the same Congress as the offense and in the present case the Senate refused to commit during the Congress in which the offense was committed. Of course, in the former case the revival of the Committee by the succeeding Congress imposes on the witness the

duty to testify before the Committee and exposes him to contempt, if after subpoena served he fails either to appear or testify. So in the present case it may be conceded, that if Cunningham had been adjudged in contempt by the 69th Congress and after the passage of Senate Resolution 10 in the 70th Congress he had refused to appear and testify, he could have been committed for contempt by the 70th Congress. In either supposititious case the commitment for the offense could not exceed imprisonment for the duration of the Congress in which the contempt is committed.

It is respectfully submitted that the only contempt of which Cunningham is guilty is that committed in the 69th Congress and that the limit of his imprisonment for the alleged offense having expired with the ending of that Congress, he cannot be committed by the 70th Congress. It is further submitted that even though the special Committee is revived by the 70th Congress he cannot be committed by that Congress since the record discloses him guilty of no contempt of either the Committee or Senate of that Congress.

The issues presented on this proceeding have been raised by respondent at no small cost to him, of time, peace of mind and personal sacrifice. It would have been easy for him to have disclosed the information by the Senate demanded. Duty as citizen in the protection of his liberty, is the motive which impelled, and the only reason which justifies his bringing to the bar of this court the fundamental questions here involved.

The burden placed on this court is not light, for the delicate issue of the propriety of the judiciary sitting in judgment on the legislative branch of government confronts it. But if the authority assumed, or the power asserted, is in violation of fundamental law and destructive of the rights and liberties of the citizen, this court will not hesitate to vindicate the right of the citizen against the usurpation of unconstitutional power.

The order and judgment of the Circuit Court of Appeals should be affirmed and writ of certiorari dismissed.

All of which is respectfully submitted.

OTTO KRAUS, JR.,
BENJAMIN M. GOLDER,
RUBY R. VALE,
Counsel for Respondent.

EXHIBIT "A".

CASES WHERE CREDENTIALS WERE REFERRED BEFORE OATH WAS ADMINISTERED.

JOHN M. NILES, Connecticut, 1844. For the term beginning March 4, 1843. The credentials presented April 30, 1844, were referred to a select committee. The report declared the charge of mental incompetency unfounded. The Senate voted to seat him.

WILLIAM M. FISHBACK, ELISHA BAXTER and WILLIAM D. SNOW, Arkansas, 1864-65. The question involved was loyalty of the State and whether the legislature electing them was the representative of the people. The committee reported, but no action was taken.

R. KING CUTLER, CHARLES SMITH and MICHAEL HAHN, Louisiana, 1864. The loyalty of the State was questioned, and the claimants were not admitted to seats.

JOSEPH SEEGAR and JOHN UNDERWOOD, Virginia, 1865. A great part of the State was in rebellion. The question was the authority of a legislature so constituted. The credentials were not finally reported. Neither candidate was seated.

D. T. PATTERSON, Tennessee, 1866. The loyalty of the State was questioned, but proof of personal loyalty resulted in a resolution to admit Patterson.

PHILIP F. THOMAS, Maryland, 1867. The question was one of personal loyalty. He was excluded.

RICHARD H. WHITELEY and HENRY P. FARROW, JOSHUA HILL and H. V. M. MILLER, Georgia, 1868-69. The question was whether the legislatures of Georgia were disqualified

under the Fourteenth Amendment, Hill and Miller were seated.

ADELBERT AMES, Mississippi, 1870. The question involved was inhabitancy. He was declared eligible and took the oath.

ABIJAH GILBERT, Florida, 1870. His seat was contested on the ground that the proceedings in the legislature were not in accordance with the statutes of the State, but Gilbert was seated, in accordance with the committee report.

MORGAN C. HAMILTON, Texas, 1871. Two Senators presented credentials for the same term. Both credentials were referred to the Committee on Privileges and Elections. Those of Hamilton were sustained, although it was charged that he was elected before the reconstruction of Texas was completed.

GEORGE GOLDTHWAITE, Alabama, 1871. The charge was that some members of the legislature which elected him had been illegally elected. Goldthwaite was seated.

THOMAS M. NORWOOD, Georgia, 1871. Contested by Foster Blodgett. Two legislatures had attempted to elect a Senator. Senator Norwood was seated.

MATT W. RANSOM, North Carolina, 1871. Contested by Joseph C. Abbott, Zebulon B. Vance had received the highest vote, but was disqualified under the Fourteenth Amendment, and did not present his credentials. Abbott received second highest vote in the election. In the meantime Ransom was elected and seated.

THE SO-CALLED LOUISIANA CASES, 1873-1880, involved the question of whether there was a constitutional State government, and included the contests of Ray and McMil-

lin. McMillin and Pinchback, Marr and Eustis, and Spofford and Kellogg.

MATTHEW C. BUTLER, South Carolina, 1877. Ground of contest was election by two legislatures. David T. Corbin, contestant, finally withdrew his contest.

HENRY A. DUPONT, Delaware, 1895. The ground of contest was alleged illegality of election. After a debate extending at intervals, over a period of several months, Mr. DuPont was declared, by a vote of 31 to 30, not to be entitled to a seat in the Senate.

GERALD P. NYE, North Dakota, 1925. Credentials were offered, but the committee considered the question whether the legislature had given the Governor power of appointment. It was decided the credentials were proper.

EXHIBIT "B".

CASES WHERE OATH WAS ADMINISTERED AND CREDENTIALS REFERRED TO COMMITTEE.

STANLEY GRISWOLD, Ohio, 1809. A committee on elections reported that Griswold was entitled to his seat, since the Governor had certified his appointment, his brief residence in the State notwithstanding. Griswold was not removed.

EPHRAIM BATEMAN, New Jersey, 1827. A memorial of protest from citizens of New Jersey was considered by the committee, but Bateman was not removed.

ELISHA POTTER vs. ASHER ROBBINS, Rhode Island, 1833. Potter's credentials were presented following those of Robbins. After debate, Robbins was admitted to take oath.

The credentials of both men were referred to a select committee. The question was which legislature of Rhode Island should be recognized. The resolution declaring Robbins elected passed, 27 to 16.

STEPHEN R. MALLORY, Florida, 1851. He took the oath, but a letter contesting the seat on the ground that he did not receive a majority of votes was referred to a select committee which reported Mallory duly elected. The Senate unanimously agreed.

LYMAN TRUMBULL, Illinois, 1855. Objection was that he had been a State Judge less than a year previous to his election, which, under the Illinois statute, was a disqualification. He was declared entitled to his seat.

JAMES HARLAN, Iowa, 1855. Objection was that in the joint session of the legislature electing, a majority of the State Senate was not present. The Senate adopted the recommendation of the committee that the seat be declared vacant.

GRAHAM N. FITCH AND JESSE D. BRIGHT, Indiana, 1857. Objection was that they were not elected by the legislature of Indiana, but "by a convocation of a portion of the members thereof, not authorized by any law of the State by resolution adopted by the legislature or by any provision of the Constitution of the United States." They were declared "entitled to their seats" June 12, 1858.

SIMON CAMERON, Pennsylvania, 1857. Objections were: (a) Irregularity of elections; (b) bribery and procurement of election by corrupt and unlawful means. Cameron resigned.

WAITMAN T. WILLEY AND JOHN S. CARLILE, VIRGINIA, 1861. Objection because Virginia was in a state of rebel-

lion. After debate the motion made to refer credentials to the committee was lost and the oath of office was administered.

JOHN P. STOCKTON, New Jersey, 1865. Objection was that the convention which elected him had by resolution prescribed a plurality rule and that he had not received a majority vote. The Senate resolved, 23 to 20, that Stockton was not entitled to his seat.

ALEXANDER MCDONALD AND BENJAMIN F. RICE, Arkansas, 1868. Contested by John T. Jones and Augustus H. Garland on the ground that contestant had been elected Senators in the year 1866 and had presented their credentials and the credentials had been ordered by the Senate to lie on the table. McDonald and Rice were seated.

THOMAS W. OSBORN, Florida, 1868. Objection was that State of Florida had not ratified the Fourteenth Amendment. The credentials were not referred to committee and Osborne was seated.

H. R. REVELS, Mississippi, 1870. Objection that Mr. Revels was partly of African blood, and, therefore, had not been a citizen of the United States for nine years preceding his election. Resolution to refer to a committee was lost, and Revels took the oath on February 25, 1870.

GEORGE E. SPENCER, Alabama, 1873. Two legislatures had elected Senators: One, George E. Spencer; the other, Francis W. Sykes. Spencer was permitted to take the oath.

L. Q. C. LAMAR, Mississippi, 1877. Objection was that the State government was a usurpation. An inquiry into alleged election fraud had been made by a select committee

and reported on August 7, 1876. "Most Senators proceeded upon the ground that Mr. Lamar had at least a prima facie title to the seat and should be sworn." He took the oath March 6.

JOHN T. MORGAN, Alabama, 1877. Objection was that the State Legislature had been fraudulently elected. Mr. Morgan was sworn in March 8, 1877.

LA FAYETTE GROVER, Oregon, 1877. Objection made on grounds of bribery and corruption. Grover was not removed.

JOHN J. INGALLS, Kansas, 1879. Contest on charge of bribery. The report exonerated Mr. Ingalls.

ELBRIDGE G. LAPHAM AND WARNER MILLER, New York, 1881. Charges of irregular election and bribery. The committee report was laid on the table.

DAVID TURPIE, Indiana, 1887-88. Objection was made that legislature was improperly organized and persons not lawful members of legislature acted as such. The Committee on Privileges and Elections reported that the facts required the U. S. Senate to consider the election by the Indiana Senate lawful and "the judgment of the Indiana Senate was conclusive on the Senate of the United States, and that the latter body could not inquire into the motive of the former." Turpie was not removed.

CHARLES J. FAULKNER, West Virginia, 1887. In this case the legislature adjourned without electing a Senator. Mr. Lucas was shortly thereafter appointed Senator by the Governor. Later the Governor called a special session of the legislature, which then elected Senator Faulkner. Both sets of credentials were presented to Congress, but Faulkner was seated.

GEORGE L. SHOUP, WILLIAM T. MCCONNELL and FRED T. DUBOIS, Idaho, 1890. There was filed a statement of the Governor of Idaho transmitting a certified copy of the proceedings of the joint convention of the legislature of that State in which three Senators were elected; one (Dubois) for the term beginning March 4, 1891, whose credentials were presented to the Senate and on the same day the credentials of Messrs. Shoup and McConnell as Senators were presented. Mr. Shoup, who was present, was sworn and took his seat. The credentials were on the same day referred to the Committee on Privileges and Elections, which reported that the credentials constituted sufficient certificate of the election and recommended that Mr. McConnell be also sworn and admitted to a seat.

FRED T. DUBOIS, Idaho, 1892. His seat was contested by William H. Claggett. Two legislatures had attempted to elect a Senator. The oath was administered to Dubois and the case referred to the Committee on Privileges and Elections. Dubois' right to a seat was confirmed.

WILKINSON CALL, Florida, 1891-92. Charge was made that Call was elected illegally by the legislature. Mr. Call was allowed to take the oath. The credentials were then examined and he continued in office.

JOHN MARTIN, Kansas, 1894-95. John Martin and Joseph W. Ady were elected by two different legislatures. Martin's title was sustained.

RICHARD R. KENNEY and JOHN E. ADDICKS, Delaware, 1897. Addicks claimed he was elected to the Senate and that Mr. Kenney was not the legally elected Senator. Kenney was seated. The credentials of Addicks were signed by the clerk of the Senate and the clerk of the House of Representatives of the Delaware legislature; those of Kenney by the Governor of the State.

REED SMOOT, Utah, 1903. Credentials were presented by his colleague, Senator Kearns. At the same time a contest was filed, raising the question of Senator Smoot's qualifications in view of his connection with the Mormon Church. On March 6, 1903, the oath of office was administered and his case referred to the Committee on Privileges and Elections, and thereafter his right to a seat was upheld.

JOHN W. SMITH, Maryland, 1908. Motion was made to refer his credentials to the Committee on Privileges and Elections, before the administration of the oath. This motion failed of adoption by a vote of 28 to 34. Senator Smith was sworn and took his seat.

WILLIAM F. KIRBY, Arkansas, 1916. The senior Senator from Missouri (Mr. Reed) moved to refer the credentials to the Committee on Privileges and Elections before the oath was administered. That motion was lost by a vote of 32 to 44 and immediately Senator Kirby took the oath of office.

GEORGE H. MOSES, New Hampshire, 1918. Senator Pomerene, chairman of the Committee on Privileges and Elections, moved that the credentials be referred to that committee before the administration of the oath of office. Senator Lodge's motion prevailed and Mr. Moses was sworn in.

TRUMAN H. NEWBERRY, Michigan, 1918. A petition of contest was filed in the Senate on January 6, 1919, and on January 7, 1912, referred to the Committee on Privileges and Elections. On March 1, 1919, his credentials were presented by Senator Smith. On May 19, 1919, the oath of office was administered. On the following day, May 20, 1919, another petition of contest was filed against him,

which was referred to the Committee on Privileges and Elections, and thereafter, on December 3, 1919, a resolution was adopted by the Senate, ordering an investigation. On January 12, 1922, his right to his seat was sustained.

EARLE B. MAYFIELD, Texas, 1922. January 17, 1923, his credentials were presented and placed on file. A contest was filed by George E. B. Peddy on February 22, 1923. The oath was administered to Mr. Mayfield on December 3, 1923. The petition of contest was referred to the Committee on Privileges and Elections and, after the committee reported, his right to his seat was sustained.

THOMAS D. SCHALL, Minnesota, 1924. His credentials were presented and filed on December 8, 1924. Notice of protest was presented and filed with the Secretary of the Senate February 2, 1925. Senator Schall took the oath of office on March 4, 1925.

ARTHUR R. GOULD, Maine, 1926. On December 6, 1926, after his credentials were presented and while he was awaiting the oath to be administered, Senator Walsh (Mont., D.,) presented a resolution in which were incorporated certain statements purporting to have been made by a judge in the province of New Brunswick in the Dominion of Canada, charging the bribery had been perpetrated. The resolution directed the Committee on Privileges and Elections to investigate the truth of the charges made. On objection the resolution went over one day and the oath was administered to Mr. Gould.

EXHIBIT "C".

Section 102: "Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month, nor more than twelve months." (R. S. S. 102, Act, Jan. 24, 1857.)

Section 103: "No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous." (R. S. S. 103, Act Jan. 24, 1862.)

Section 104: "Whenever a witness summoned as mentioned in section one hundred and two (of Revised State- S. 112 hereof) fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the ground jury for their action." (R. S. S. 104, Act Jan. 24, 1857.)

Section 859: "No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceed-

ing against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege." (R. S. S. 859, Act Jan. 24, 1862.)